SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 186

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION No. 89 INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. OF L., ETC., ET AL., PETITIONERS,

vs.

THE AMERICAN TOBACCO COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

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[fols. a-1] [Caption omitted]

[fol. 2]

IN JEFFERSON CIRCUIT COURT, CHANCERY BRANCH, — DIVISION

THE AMERICAN TOBACCO COMPANY, INC. (1700 W. Broadway), Plaintiff,

vs.

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an Unincorporated Labor Union (813 South First St.); Paul W. Priddy (1472 Kentucky Ave.); Joseph Burrell (Address Unknown); Stoy Decker (2311 W. Lee); Willard Marples (131 E. Avery St.); James Mallory (1111 Oldham Ct., Apt. 19); Alma Harper (511 S. 21st St.); Individually, and as Representatives of a Class Consisting of Members of General Drivers, Warehousemen and Helpers, Local Union #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an Unincorporated Labor Union, Defendants

PETITION IN EQUITY—Filed April 4, 1953

Plaintiff, The American Tobacco Company, Inc., states that it is and at all time hereinafter mentioned it was a corporation organized under and existing by virtue of the laws of the State of New Jersey, with power to sue and be sued, contract and be contracted with, and to carry on, in intra and interstate commerce in the State of Kentucky and elsewhere, the business of manufacturing and selling cigarettes and other tobacco products.

The defendant, General Drivers, Warehousemen and Helpers, Local Union #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., is an unincorporated labor organization, consisting of employees of numerous other corporations, firms and individuals engaged principally in the

business of transporting and warehousing merchandise in [fol. 3] the City of Louisville, in the State of Kentucky, and in surrounding territories. It is comprised of members so numerous as to render it impracticable to bring them all before the Court within a reasonable time and their names are unknown to the plaintiff. None of plaintiff's employees are members of said union, nor is it the authorized agent for collective bargaining or any other purpose of any employee of plaintiff. For convenience it will hereafter be referred to as Local 89.

Paul W. Priddy, Joseph Burrell, Stoy Decker, Willard Marples, James Mallory and Alma Harper are members of Local 89 aforesaid and they and each of them are made defendants individually and for and on behalf of the class consisting of all the members of said Local 89 to which the said individual members belong. In addition to being members of Local 89, Paul W. Priddy is President thereof; Joseph Burrell is Vice-President thereof; and Stoy Decker is Business Agent thereof.

Plaintiff states that it is a corporation engaged in the manufacture and sale of cigarettes and other tobacco products with a nationwide business, and that in the course of that business a substantial portion of the raw materials and supplies which it uses move to its Louisville factory in interstate commerce, and a substantial portion of the manufactured products of said factory are sold in interstate commerce; that its factory, with respect to which this action is concerned, is located in the City of Louisville, at 17th Street and Broadway, and that it has approximately fifteen hundred employees working in said factory.

That plaintiff's employees at its said factory are all represented by a different labor organization from Local 89, and no grievance or dispute exists between plaintiff and [fol. 4] any of its employees, and that none of the actions of defendants hereinafter described were done on behalf of plaintiff's employees or with the purpose of representing plaintiff's employees, or of obtaining any benefit for them, or of obtaining their membership in Local 89, or of obtaining the right of Local 89 to represent them. A contract covering wages and working conditions is presently in force between plaintiff and all its employees and said

employees are working harmoniously under said contract and desire to continue to do so without interference or molestation. Said contract provides that plaintiff's employees will not participate in any unauthorized strike and no strike has been authorized for said employees.

Plaintiff states that Local 89 is the authorized representatives for the purposes of collective bargaining of certain employees of a separate corporation, to-wit, American Suppliers, Incorporated, and that many of the persons who have been picketing plaintiff's factory, including Willard Marples, James Mallory, and Alma Harper are employees of American Suppliers, Incorporated. A dispute exists between said corporation and its said employees and Local 89 as the bargaining agent of said employees, but said dispute has no connection with this plaintiff, and plaintiff is not a party thereto, nor involved therein, nor are any of plaintiff's employees.

Said American Suppliers, Incorporated, is a Delaware corporation engaged in the business of purchasing, curing, and processing leaf tobacco, which is entirely different from the business of manufacturing cigarettes and other tobacco products engaged in by the plaintiff, and the two corporations have no officers in common and maintain separate offices and manufacturing plants for the carrying on of their different businesses. Plaintiff is the owner of a majority of the stock in said corporation and [fol. 5] has heretofore purchased tobacco from said corporation. But the employees and the types of business and the businesses actually carried on by said two corporations are entirely separate. Said American Suppliers, Incorporated, has heretofore operated a plant immediately behind plaintiff's factory above described in which it processed tobacco, but said plant used a separate loading dock and entrance located on 17th Street for the movement of merchandise and personnel in and out of said plant. The principal entrance to plaintiff's plant, on the other hand, is on Broadway and is not now and has never been used by American Suppliers, Incorporated, for ingress and egress of personnel or shipment or receipt of merchandise.

At the present time and since the beginning of the strike

hereinafter described, plaintiff is not procuring merchandise from, or doing business with, the Louisville Plant of American Suppliers, Incorporated.

In spite of the fact that there is no connection between plaintiff's employees or plaintiff on the one hand and the defendants or any of them on the other, the defendants have since the morning of Monday, March 30, 1953, established and maintained a picket line consisting of a large and unreasonable number of pickets around plaintiff's said factory and has endeavored to prevent plaintiff's employees from working and to prevent plaintiff from carrying on its operations and to prevent other corporations, including common carriers, contract carriers, warehousemen and various other unrelated types of businesses doing business with plaintiff, from performing their contracts with plaintiff, and from performing their legal obligations to plaintiff by receiving, transporting, handling, and delivering plaintiff's merchandise—all in violation of the public policy [fol. 6] and the law of the State of Kentucky.

In the course of said activities and as a means of promoting and effecting said unlawful objectives, the defendants, including not only those expressly hereinabove named but also many other members of Local 89 whose names are unknown to plaintiff, and other persons associating and confederating with them, have done the following acts:

1. They have blocked all the entrances to plaintiff's factory so that the employees of plaintiff and members of the public and persons doing business with plaintiff are interfered with and in some instances physically prevented from going in and out of such entrances.

2. They have established picket lines consisting of large numbers of people and have assembled other large groups of people in front of, around, and immediately adjacent to plaintiff's said factory for the purpose of intimidating by their numbers persons desiring to enter or leave plaintiff's premises and particularly employees of the plaintiff.

3. They have attempted to draw into their dispute with American Suppliers, Incorporated, strangers to their dispute, to-wit: Plaintiff and its employees, its suppliers, its customers and the other persons with whom plaintiff does business, none of whom are within the sphere of the dis-

pute between the defendants and American Suppliers, Incorporated.

4. Their acts constitute unlawful, unjustified, and malicious interference with the business of plaintiff and of its relations with its employees and also amount to unlawful hindering of persons who desire to labor from doing so, in that defendants, without just cause or legal excuse for so doing, have entered into a confederation, conspiracy, agreement, arrangement or understanding for the purpose of [fol. 7] hindering, delaying, or preventing plaintiff from carrying on its lawful business.

5. They have unlawfully interfered with the property rights of the plaintiff, including, among other things, its contract of employment with its employees.

6. They have by the acts hereinabove and hereinafter described endeavored to coerce and intimidate plaintiff's employees into committing a breach of their contract of employment with the plaintiff.

7. The defendants and particularly those engaged in picketing plaintiff's plant as aforesaid, have used vile, profane, threatening, and slanderous language to young women and other employees of the plaintiff, who undertake to go in and out of plaintiff's places of business.

8. They have made physical attacks upon employees of plaintiff principally upon young women who were endeavoring to enter or leave plaintiff's premises of such severity that at least two of plaintiff's employees have required hospitalization or medical treatment.

9. They have made telephone calls to plaintiff's employees threatening serious bodily injury and destruction of their property if they continue to work for plaintiff.

10. They have meddled with, damaged, and forcibly occupied automobiles belonging to plaintiff's employees. They have forcibly occupied and refused to leave the automobile of one employee and have let the air out of the tires of the automobile of another employee.

11. They have thrown missiles at trucks making deliveries to plaintiff's premises.

[fol. 8] 12. They have followed plaintiff's trucks in automobiles occupied by three or more persons in a manner calculated to indicate a threat of bodily harm to the operators of said trucks.

13. They have induced, encouraged, and coerced and conspired with the employes of sundry common carrier truck lines, sundry contract carrier truck lines, and sundry other unrelated corporations, firms and individuals with whom plaintiff ordinarily does business, to refuse and to cause their employers to refuse: To receive shipments of merchandise from plaintiff, including not only shipments originating at plaintiff's Louisville factory, but also shipments originating outside the State of Kentucky, these shipments of both classes including property moving in interstate commerce as well as property moving in intrastate commerce; to transport shipments of all the above-named classes to or from the plaintiff; to deliver shipments of all the said classes either to plaintiff's factory or to plaintiff at their own loading docks or terminals or other places remote from plaintiff's factory, or to deliver the same to carriers and other agents employed by plaintiff to receive the same; to deliver to plaintiff, plaintiff's agents, or any person acting for plaintiff, property in their possession belonging to plaintiff and to which plaintiff was entitled to immediate possession.

14. In addition to the complete refusal above-mentioned, said defendants, their employers, and the persons acting with them, as above set out, have refused to do the said acts, excepting after unreasonable delay and excepting after obtaining the specific permission therefor from the defendant Local 89, thereby subjecting plaintiff to delay, inconvenience, and expense in obtaining its property.

[fol. 9] 15. They have induced, encouraged, and caused the truck drivers of one of plaintiff's suppliers engaged in unloading merchandise at plaintiff's loading dock to uncouple the tractor unit from the trailer unit of their trucks and to leave two large trailer units blocking plaintiff's loading dock for an extended period.

All of said acts were done for the wrongful and unlawful purposes of embroiling plaintiff and its employees in a labor dispute with which they have no concern; of interfering with plaintiff's relations with its employees and their reciprocal contract obligations; of inducing, encouraging, and coercing other persons, firms, and corporations to refuse to enter into or perform contracts with plaintiff in

accordance with their legal obligations to plaintiff and their duties as common carriers and as custodians of property belonging to, shipped to, or shipped by, plaintiff.

Said acts and each of them were performed not only by the defendants, but by other persons associated, confederated, and conspiring and acting in concert with them.

The unlawful activities of the defendants hereinbefore set out have resulted and will continue to result in great and irreparable injury suffered by plaintiff, and which plaintiff will continue to suffer, and in the violation of plaintiff's rights for which it has no adequate remedy at law or otherwise, save in a Court of Equity; irreparable injury and damage will result to plaintiff from the delay in giving notice of its application for an injunction. No previous application for an injunction herein has been made or refused by this Court or any other Circuit Judge, or at all.

Wherefore, plaintiff, the American Tobacco Company, Inc., prays that the defendants, General Drivers, Warehousemen and Helpers, Local Union #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen [fol. 10] and Helpers of America, A. F. of L., and unincorporated labor union; Paul W. Priddy, Joseph Burrell, Stoy Decker, Willard Marples, James Mallory and Alma Harper, individually, and as representatives of a class consisting of members of General Drivers, Warehousemen and Helpers, Local Union #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an unincorporated labor union, and each of them, and each of the members of said General Drivers, Warehousemen and Helpers, Local Union # 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an unincorporated labor union, and their confederates and associates, be temporarily restrained and temporarily and permanently enjoined:

1. From picketing or maintaining pickets or attempting to picket or maintain pickets at or about plaintiff's premises;

2. From taking any steps seeking to induce plaintiff's employees not to work for plaintiff;

3. From causing or threatening injury to the persons

or property of the employees of plaintiff, or the property of plaintiff;

4. From using abusive, vile, profane, or threatening language to plaintiff's employees or others seeking to enter or leave plaintiff's premises or to do business with plaintiff;

5. From refusing, or inducing, encouraging, coercing or otherwise causing, or arranging with, the employees of other employers, particularly common carriers, or with such employers, to refuse, to accept, handle, transport, and deliver, in accordance with their legal and contract obligations, property shipped by or to plaintiff.

Plaintiff further prays for its costs herein expended and for all further relief both general and equitable which may seem proper in the premises.

(S.) Sites Wood Helm & Taylor, Attorneys for Plaintiff.

[fols. 11-14] *Duly sworn to by J. G. Hager. Jurat omitted in printing.*

[fol. 15] In Jefferson Circuit Court, Chancery Branch
Temporary Restraining Order—April 6, 1953

At a court held April 6, 1953.

Comes the plaintiff, by counsel and filed a duly executed notice herein.

Comes plaintiff, by counsel and in writing filed, moved the court to grant it a temporary injunction restraining the defendants, General Drivers Warehousemen and Helpers, Local Union #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an unincorporated labor union; Paul W. Priddy, Joseph Burrell, Stoy Decker, Willard Marples, James Mallory, Alma Harper, individually, and as representatives of a class consisting of members of General Drivers, Warehousemen and Helpers, Local Union #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an unincorporated labor union, and each of them, including all members of said unin-

corporated labor union, and their agents, confederates and associates:

1. From picketing or maintaining pickets or attempting to picket or maintain pickets on Broadway at or about plaintiff's premises;

2. From taking any steps seeking to induce plaintiff's employees not to work for plaintiff.

3. From causing or threatening injury to the persons of property of the employees of plaintiffs, or the property of plaintiff;

4. From abusing, vile or profane or threatening language to plaintiff's employees or others seeking to enter or leave plaintiff's premises or to do business with plaintiff;

5. From refusing or inducing, encouraging, coercing or [fol. 16] otherwise causing or arranging with, the employees of other employees, particularly common carriers, or with such employers, to refuse, to accept, handle, transport and deliver in accordance with their legal and contract obligation, property shipped by or to plaintiff.

Com- the defendant, General Drivers, Warehousemen and Helpers Local Union #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., and Paul W. Priddy, Joseph Burrell, Stoy Decker, Willard Marples, James Mallory and Alma Harper, without waiving their jurisdiction of this court and in writing filed, moved the court to quash the summons and notice issued against them herein.

The court being advised, it is ordered by the Court that this motion be and the same is hereby overruled, to which the defendants object and except.

This cause coming on to be heard on motion for temporary restraining order and the court being advised, said restraining order is hereby issued and entered subject to the following conditions.

So long as this restraining order shall remain in force, plaintiff is ordered and directed not to permit any employees of American Suppliers, Inc., other than supervisory, clerical and maintenance, to use plaintiff's Broadway entrance, nor to use said Broadway entrance for the shipment of tobacco in or out of American Suppliers, Inc., plant on the premises.

This action not having been assigned to either division

of the Chancery Branch of this Court, came on for hearing before the Judge of the First Division at 2 P. M., on April [fol. 17] 6, 1953, pursuant to notice, upon the verified petition of the plaintiff herein and the affidavit therein contained.

And counsel being heard, and it further appearing to the Court that danger of great and irreparable injury to the plaintiff and its employees might be caused by failure to issue a restraining order, or from the delay of giving further notice.

It Is Ordered:

That the defendants, General Drivers, Warehousemen and Helpers, Local Union #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an unincorporated labor union; Paul W. Priddy, Joseph Burrell, Stoy Decker, Willard Marples, James Mallory, Alma Harper, individually and as representatives of a class consisting of members of General Drivers, Warehousemen and Helpers, Local Union #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an unincorporated labor union and each of them, and all members of said unincorporated labor union, and their confederates and associates, until plaintiff's motion for a temporary injunction can be heard and determined, be temporarily restrained:

1. From picketing or maintaining pickets or attempting to picket or maintain pickets on Broadway at or about plaintiff's premises;

2. From taking any steps seeking to induce plaintiff's employees not to work for plaintiff;

3. From causing or threatening injury to the persons or property of the employees of plaintiff or the property of plaintiff;

4. From using abusive, vile, profane or threatening lan- [fols. 18-34] guage to plaintiff's employees or others seeking to enter or leave plaintiff's premises or to do business with plaintiff;

5. From refusing or inducing, encouraging, coercing or otherwise causing, or arranging with, the employees of other employers, particularly common carriers, or with such employers, to refuse to accept, handle, transport and deliver in

accordance with their legal and contract obligations, property shipped by or to plaintiff.

Plaintiff's motion for a temporary injunction is hereby set for hearing before the Judge of the Chancery Branch, 1st Division, Jefferson Circuit Court, in Louisville, Ky., on April 14th, 1953 at 2 P. M., and the restraining order herein granted shall continue in force until plaintiff's said motion is heard and determined.

This order shall not take effect and no restraining order hereunder shall be issued by the clerk until plaintiff shall have given bond with good surety, approved by the clerk of this court, wherein plaintiff shall obligate itself to pay to the defendante the damages, not exceeding one Thousand Dollars which they may sustain by reason of this restraining order if it is finally determined that said restraining order ought not to have been granted.

[fol. 35] In Jefferson Circuit Court, Chancery Branch, — Division

[Title omitted]

Affidavit—Filed April 10, 1953

[fol. 36] Lloyd Cardwell, being first duly sworn, states that about 2:30 P. M., on Thursday, April 9, 1953, he inquired of J. L. Biery as to the names of the persons concerned in the refusal of the Bowling Green Express, a common carrier, to handle or deliver a shipment of twist tobacco in the hands of said Company, pursuant to shipment from Nashville, Tennessee, to Louisville, Kentucky, and that said J. L. Biery advised him that the following employees of said Company had refused to handle or deliver said tobacco; Robert Smith, Charles Moore, Delmar Hightower, Jacob Lee, Jr., Christopher Evans, Ernest Spencer, and Fred Ham; that Robert Smith, as Shop Steward for Local 89, had obtained instructions from Local 89 through Marion N. Winstead and Virgil Denton, Business Agents of said Union, not to handle said tobacco and had, pursuant

to those instructions, forbidden the other employees above-named to handle the same.

(S.) Lloyd Cardwell.

Subscribed and sworn to before me by Lloyd Cardwell, this 10th day of April, 1953. My commission expires October 17, 1955. (S.) Alberta B. Terry, Notary Public, Jefferson County, Kentucky.

In Jefferson Circuit Court, Chancery Branch, — Division

[Title omitted]

Affidavit—Filed April 10, 1953

[fol. 37] G. J. Lodde, states that he is District Traffic Manager of the American Tobacco Company, 17th and Broadday, Louisville, Kentucky, and that on April 9, 1953, he telephoned J. L. Biery, Manager of the Bowling Green Express Company office at Louisville, Kentucky, to determine whether or not a shipment of 500 cases of Cotton Boll Twist Tobacco had been received from Nashville Branch, The American Tobacco Company, Nashville, Tennessee, for delivery to The American Tobacco Company at Louisville; that J. L. Biery advised him that said tobacco had arrived at the terminal of the Bowling Green Express Company at 13th and Market Streets but that Bob Smith, the union steward at the Bowling Green Express Company office refused to permit the Company to deliver said tobacco and refused to handle said tobacco if American Tobacco Company sent its own trucks out to pick it up, because the employees of the Bowling Green Express Company were members of General Drivers, Warehousemen and Helpers Local Union No. 89; that subsequently J. L. Biery advised this affiant that he had talked to Virgil Denton, head business agent of General Drivers, Warehousemen and Helpers Local # 89 who repeated the refusal to deliver or handle said tobacco.

Affiant further states that he again called J. L. Biery on April 10, 1953 and asked him when said tobacco would be delivered to American Tobacco Company; that J. L. Biery then informed him that the employees of Bowling Green

Express who are represented by Local # 89, still refused to deliver said tobacco to American Tobacco Company but that they would unload said tobacco from the semi-trailer on which it had been received in Louisville and would permit American Tobacco Company employees to load and remove said tobacco from the loading dock of the Bowling [fols. 38-44] Green Express Company.

Affiant states that on April 9 and 10, he advised J. L. Biery that a restraining order had been issued prohibiting refusal to deliver to American Tobacco Company, and that said J. L. Biery stated on April 10, 1953 that he had received a copy of said order. Affiant further states that on April 10, 1953 he advised said J. L. Biery that it would not be necessary for the employees of Bowling Green Express Company to cross any picket line in order to enter the premises of The American Tobacco Company for the purpose of delivering said tobacco.

(S.) George J. Lodde.

Subscribed and sworn to before me this 10th day of April, 1953. (S.) Clemens M. Hutti, Notary Public, Jefferson County, Ky. My commission expires January 28, 1955.

[fol. 45] In Jefferson Circuit Court, Chancery Branch, — Division

[Title omitted]

Response to Motion for Temporary Injunction and Answer to Petition—Filed April 14, 1953

Come the defendants, Paul W. Priddy, Joseph Burrell, Stoy Decker, Willard Marples, James Mallory, and Alma Harper, who for themselves in answer to the plaintiffs petition for injunction and in response to the plaintiffs Motion for a Temporary Injunction state:

I

The American Tobacco Company, Inc., plaintiff herein, and the American Suppliers, Inc., are engaged in interstate

commerce and in the transportation of articles in interstate commerce and by virtue of the statutes of the United States of America jurisdiction to enjoin unfair labor practices including alleged secondary boycotting activities is vested exclusively in the Federal Courts and the right to maintain such actions for injunction is vested exclusively with the General Council of the National Labor Relations Board.

II

Defendants, Paul W. Priddy, Joseph Burrell, Stoy Decker, [fol. 46] Willard Marples, James Mallory and Alma Harper, deny that there is no labor dispute existing between plaintiff in this action and the members of Local 89; denies that the plaintiff is not procuring merchandise from or doing business with the Louisville Plant of the American Suppliers, Inc., deny specifically each of the allegations Numbered 1 to 15 contained in plaintiffs petition and appearing on Pages four through seven.

Defendants, Paul W. Priddy, Joseph Burrell, Stoy Decker, Willard Marples, James Mallory and Alma Harper, further deny that from the actions of the defendants the plaintiffs have suffered and will continue to suffer, great and irreparable injury and that the plaintiffs have no adequate remedy at law or otherwise save in a Court of Equity against the actions of the defendants.

III

Defendants, Paul W. Priddy, Joseph Burrell, Stoy Decker, Willard Marples, James Mallory and Alma Harper, state that the American Suppliers, Inc., is a wholly owned subsidiary of the American Tobacco Company and that the activities of the American Tobacco Company, Inc., plaintiff herein, and the American Suppliers, Inc., are so interwoven that it is impossible to clearly demarcate the activities of the plaintiff from those of the American Suppliers, Inc.; they state that as a result of this strike plaintiff performing functions and activities normally performed by the American Suppliers, Inc.; that the employees of the American Tobacco Company are performing work normally performed by employees of the American Suppliers, Inc. and that non-striking employees of the American Suppliers, Inc. are using equipment and plant of the plaintiff to perform func-

[fol. 47] tions normally performed at the American Suppliers Plant; they further state that all of the activities that the American Suppliers, Inc. are normally performed and are now performed upon property completely controlled by the plaintiff herein.

IV

Defendants, Paul W. Priddy, Joseph Burrell, Stoy Decker, Willard Marples, James Mallory and Alma Harper, state that the situs of the dispute between members of the General Drivers, Warehousemen and Helpers, Local Union # 89, and the American Suppliers, Inc. is 1700 West Broadway; that the American Suppliers, Inc. is engaged in business there and that all picketing conducted against the American Suppliers, Inc. has been conducted within reasonable distance of the situs of dispute; that further they state that all picketing activities and activities related thereto have clearly disclosed that the dispute sought to be advanced by the picketing is with the American Suppliers, Inc.

V

Defendants, Paul W. Priddy, Joseph Burrell, Stoy Decker, Willard Marples, James Mallory and Alma Harper, further state that the plaintiff should be denied relief in this court because it has repeatedly violated the orders issued by this court in that:

1. Plaintiff has permitted Supplies and Equipment destined for delivery to the American Suppliers, Inc. to be delivered to their dock at 1700 West Broadway.

2. Plaintiff has permitted egress and ingress through their entrances of employees of the American Suppliers, Inc. other than management and office personnel.

[fols. 48-50] 3. American Tobacco Company is operating plant and facilities of American Suppliers Inc. with employees of the American Tobacco Co.

4. Plaintiff has wilfully mislead the court in stating that the facilities of the American Tobacco Co. have not been used for delivery and shopping of materials in commerce with the American Suppliers, Inc.

Wherefore the defendants, Paul W. Priddy, Joseph Burrell, Stoy Decker, Willard Marples, James Mallory and

Alma Harper, having fully answered pray that the plaintiffs petition and Motion for Temporary Injunction be dismissed; prays for their costs herein and for all relief to which they might in equity be entitled.

(S.) Hardy & Logan and Robert W. Zollinger, Attys. for Defendants; Paul W. Priddy, Joseph Burrell, Stoy Decker, Willard Marples, James Mallory and Alma Harper.

[fol. 51] In Jefferson Circuit Court Chancery Branch, — Division

[Title omitted]

Response and Answer to Petition of General Drivers, etc. —Filed April 15, 1953

Comes, Paul Priddy, who upon being ordered to defend the above styled action for and on behalf of the members of General Drivers Warehousemen and Helpers, Local #89, without waiving objections to the jurisdiction of this court heretofore raised and answering solely upon the order of the court without authorization to so answer by the members of General Drivers Warehousemen and Helpers, Local #89, states:

I

The American Tobacco Company, Inc., plaintiff herein, and the American Suppliers, Inc., are engaged in interstate commerce and in the transportation of articles in interstate commerce and by virtue of the statutes of the United States of America Jurisdiction to enjoin unfair labor practices including alleged secondary boycotting activities is vested exclusively in the Federal Courts and the right to maintain such actions for injunction is vested exclusively with the General Council of the National Labor Relations Board.

[fol. 52] Defendant, General Drivers Warehousemen and Helpers, Local #89, deny that there is no labor dispute existing between the plaintiff in this action and the members of Local #89; denies that the plaintiff is not procuring merchandise from or doing business with the Louisville Plant of the American Suppliers, Inc.; denies specifically each of

the allegations Numbered 1 to 15 contained in plaintiff's petition and appearing on Pages 4 through 7.

Defendant, General Drivers Warehousemen and Helpers, Local #89, denies that from the actions of the defendants the plaintiffs have suffered, and will continue to suffer, great and irreparable injury and that the plaintiffs have no adequate remedy at law or otherwise save in a Court of Equity against the actions of the defendants.

III

Defendant, General Drivers Warehousemen and Helpers, Local #89, state that the American Suppliers, Inc. is a wholly owned subsidiary of the American Tobacco Company, Inc., plaintiff herein, and the American Suppliers, Inc., are so interwoven that it is impossible to clearly demarcate the activities of the plaintiff from those of the American Suppliers, Inc.; that state that as a result of this strike plaintiff is performing functions and activities normally performed by the American Suppliers, Inc.; that the employees of the American Tobacco Company are performing work normally performed by employees of the American Suppliers, Inc. and that non-striking employees of the American Suppliers, Inc. are using equipment and plant of the plaintiff to perform functions normally performed at the American Suppliers, Inc.; they further state that all of the activities that the American Suppliers, Inc. are normally [fol. 53] performed and are now performed upon property completely controlled by the plaintiff herein.

IV

Defendants, General Drivers, Warehousemen and Helpers, Local Union #89, state that the situs of the dispute between members of the General Drivers, Warehousemen and Helpers Local Union #89, and the American Suppliers, Inc. is 1700 West Broadway; that the American Suppliers, Inc. is engaged in business there and that all picketing conducted against the American Suppliers, Inc. has been conducted within reasonable distance of the situs of dispute; that further they state that all picketing activities and activities related thereto have clearly disclosed that the dis-

pute sought to be advanced by the picketing is with the American Suppliers, Inc.

V

Defendants, General Drivers, Warehousemen and Helpers, Local Union #89, further state that the plaintiff should be denied relief in this court because it has repeatedly violated the orders issued by this court in that:

1. Plaintiff has permitted supplies and equipment destined for delivery to the American Suppliers, Inc. to be delivered to their dock at 1700 West Broadway.

2. Plaintiff has permitted egress and ingress through their entrances of employees of the American Suppliers, Inc. other than management and office personnel.

3. American Tobacco Company is operating plant and facilities of American Suppliers, Inc. with employees of the American Tobacco Co.

[fols. 54-116] 4. Plaintiff has wilfully misled the court in stating that the facilities of the American Tobacco Co. have not been used for delivery and shipping of materials in commerce with the American Suppliers, Inc.

Wherefore the defendant, General Drivers, Warehousemen and Helpers Local Union #89, having fully answered pray that the plaintiffs petition and Motion for Temporary Injunction be dismissed; prays for their costs herein and for all relief to which they might in equity be entitled.

(S.) Hardy & Logan and Robert W. Zollinger, Attorney for Defendant; General Drivers, Warehousemen & Helpers, Local Union #89.

[fol. 117] In Jefferson Circuit Court, Chancery Branch, — Division

[Title omitted]

Affidavit of Virgil A. Denton—Filed April 20, 1953

Affiant, Virgil A. Denton, being first duly sworn, deposes and says that he is an assistant business agent for General Drivers, Warehousemen and Helpers, Local Union #89,

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., assigned as his particular duties the representation of men in the City Pick-Up and Delivery Division; that as such he was informed on a restraining order to be issued by the Jefferson Circuit Court, Judge Macauley L. Smith; that he was aware that as a condition of such restraining order there was a provision that the American Tobacco Company would not receive shipments of unprocessed tobacco through their Broadway dock;

Affiant further states that on the morning of April 9, 1953, he received a call from Jack L. Berry of the Bowling Green Express Company, wherein it was discussed that a shipment of tobacco had been received from Bowling Green for delivery to the American Tobacco Company; that at such time he informed Mr. Berry that no tobacco could be delivered to the American Suppliers Company but that no deliveries to the American Tobacco Company were being halted; he states that Mr. Berry then informed him that men employed by him were refusing to deliver the tobacco;

[fol. 118] Affiant further states that he asked Mr. Berry why he did not secure trucks from the American Tobacco Company to come to the docks and pick the shipment up and take it back to 1700 W. Broadway, to which Mr. Berry replied that the men were refusing to unload the trailer; that he informed Mr. Berry that it was the duty of the men to unload the shipment on to the dock and that they could not refuse and that in the event of their refusal the Union would sustain their dismissal. Apparently Mr. Smith was standing beside Mr. Berry at the time of this conversation and that this suggestion was conveyed by Mr. Berry to affiant that the American Tobacco Company trucks back directly into the trailer and load it directly. At no time did the affiant inform anybody that shipments to the American Tobacco Company would not be delivered.

Affiant states that there is existing at the present time a contractual agreement between the employees through Local #89 and the Bowling Green Express Company providing for dismissal or reprimand for refusal to follow an order given by the employer, and that a copy of such agreement is attached hereto and made a part of this affidavit.

Affiant states that at no time since the shipment of tobacco was received by the Bowling Green Express has he been in communication with any of the employees of the said company.

Affiant states that as evidence of his abiding by the terms of the restraining order he is filing herewith and making a part hereto a letter received from R. L. McDonald of Huber and Huber Express Company, Inc., informing Mr. James Burns, an employee of said company, of his discharge. [fols. 119-119d] Affiant states that the discharge of James Burns was occasioned by the said Mr. Burns' refusal to deliver a shipment of goods to the American Tobacco Company and that upon being apprised of such refusal Local #89 has refused to intervene on behalf of the said James Burns.

Affiant states that he has taken every step that he has found it possible to make in order to assure compliance with the temporary restraining order issued in the above styled action.

Further affiant saith not.

(S.) Virgil A Denton.

Subscribed and sworn to before me by Virgil A. Denton this 18th day of April, 1953. (S.) Robert W. Zollinger, Notary Public, Jefferson County, Kentucky. My Commission expires July 13, 1954.

[fol. 119e] SECTION 3 OF ARTICLE II

(a) The Employer shall not discharge nor suspend any employee without just cause, but in respect to discharge must give at least one (1) warning notice of the complaint against such employee to the employee in writing, with a copy to the Union, except that no warning notice need be given to an employee before he is discharged if the cause of such discharge is dishonesty, drunkenness, use of alcoholic beverages while on duty, carrying of unauthorized passenger, too great an accident frequency, the instigation of or participation in a wild cat strike or slow down or refusal to perform his usual normal legitimate duties as di-

rected by management. Violation on the part of an employee of the rules and regulations as provided by municipal, state or federal laws or authorities as relating to motor transportation shall, among other things, be considered cause for disciplinary action on the part of the Employer, [fols. 119f-119bb] and shall subject the employee to temporary or permanent dismissal from employment.

(b) Discharge must be by proper written notice to the employee and the Union. Warning notices shall have no force or effect after nine (9) months from the date thereof. Any employee may request an investigation as to his warning notice, discharge, or suspension, and such request shall be handled as provided in Article III, Grievance Procedure.

(c) It shall not be considered a violation of this Agreement for employees covered hereunder to refuse to cross a picket line of a Union or refuse to handle unfair goods. The term unfair goods, as used in this section includes, but is not limited to, any goods or equipment transported, interchanged, handled, or used by any *carrier*, whether party to this Agreement or not, at whose terminal or terminals or place or places of business, there is a controversy between such carrier or its employees on the one hand and a labor union on the other hand; and such goods or equipment shall continue to be "unfair" while being transported, handled, or used by interchanging of succeeding carriers whether parties to this Agreement or not, until such controversy is settled.

[fols. 119cc-120] ARTICLE IX

Central States Area Over-the-Road Motor Freight

Agreement

Period covered ..... February 1, 1952
to January 1, 1955

Protection of Rights

"It shall not be a violation of this contract and it shall not be cause for discharge if any employee or employees refuse to go through the picket line of a Union or re-

fuse to handle unfair goods. Nor shall the exercise of any rights permitted by law be a violation of this contract.

The term "unfair goods" as used in this Article includes but is not limited to, any goods or equipment transported, interchanged, handled, or used by any carrier, whether party to this Agreement or not, at whose terminal or terminals or place or places of business there is a controversy between such carrier or its employees on the one hand, and a labor union on the other hand; and such goods or equipment shall continue to be "unfair" while being transported, handled or used by interchanging or succeeding carriers, whether parties to this Agreement or not, until such controversy is settled.

The Union agrees that, in the event the Employer becomes involved in a controversy with any other Union, the Union will do all in its power to help effect a fair settlement.

It is understood that in the event the decision of the National Labor Relations Board in the Conway case is sustained or prevails on appeal to the higher Federal Courts, this Article will be renegotiated and rewritten to provide the Union with the maximum of protection afforded by such decision."

[fol. 121] In Jefferson Circuit Court, Chancery Branch, Second Division

The American Tobacco Company, Inc., Plaintiff,

vs.

General Drivers, Warehousemen and Helpers, Local Union #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., Is the Authorized Representative for the Purpose of Collective Bargaining of Employees of American Suppliers, Inc., Defendants

Opinion—Filed April 22, 1953

Since the morning of March 30th this Union and its members and associates have been on strike and have maintained

picket lines at, or adjacent to, the plant of American Suppliers. On April 6th, at the insistence of the plaintiff herein, American Tobacco Company, Inc., a restraining order was issued enjoining certain acts upon the part of the Union, and specifically prohibiting the Union from maintaining pickets at the Broadway entrances to plaintiff's property at 17th and Broadway and from refusing, through its members, to make deliveries of property shipped to the plaintiff or to induce or encourage others from making deliveries of such property.

The plaintiff professes to be a stranger to the labor dispute between defendants and American Suppliers, although it is admitted that the last named corporation is a wholly owned subsidiary of plaintiff. Locally the two Corporations are indeed separately administered. Mr. John G. Hager is the Branch Manager of The American Tobacco Company, and Mr. W. B. Turner occupies a similar position with American Suppliers. Neither takes orders from the other, although they, of course, cooperate with each other. [fol. 122] The superiors of both are in the Home Offices of the two Corporations at points outside of Kentucky. Since it is not denied, it must be presumed that somewhere in a higher echelon, perhaps as high as the Board of Directors of the parent Corporation, common control is exercised over all elements of both Corporations, including the two local organizations. The physical layout of the plants is significant. In the local telephone directory both American Tobacco Company and American Suppliers are listed as being located at 1700 West Broadway in this City. The plant of American Suppliers is, loosely speaking, located in the middle of an industrial area, all of which is owned by The American Tobacco Company, indeed, the ground upon which American Suppliers' plant was erected is owned by American Tobacco and leased to American Suppliers. American Suppliers' plant cannot be entered without crossing property owned by and under the control of American Tobacco. American Suppliers pays American Tobacco rental for the use of its property, but no witness could state the terms of the lease or whether there is a written lease. Except where the various factory buildings about the perimeter of the plant area, a high fence serves to enclose it. Thus the whole property, including American

Tobacco and American Suppliers, appears to the casual observe- as the plant area of one industrial owner. No fence separates American Tobacco from American Suppliers.

American Suppliers buys raw tobacco, puts it through initial processing, sells it to American Tobacco, which further processes it into marketable products of cigarettes, etc. Mr. Turner testified that the entire output of American [fol. 123] Suppliers is purchased by American Tobacco. A Conveyor belt connecting the two plants delivers the processed tobacco from American Suppliers to American Tobacco.

Indicative of how closely enmeshed are the operations of the two Corporations is the undenied fact that a truck owned and operated by the American Suppliers displays an advertisement of Lucky Strike Cigarettes, a well known product of American Tobacco. Moreover, a building of American Suppliers located at 7th and Arcade, (not involved in this injunction proceeding except incidently), has a sign over its entrance "American Tobacco Company."

Occasionally employees of American Suppliers do work for American Tobacco, although when they do a record is kept and American Tobacco pays American Suppliers for such services. Employers of American Suppliers for several months now have been receiving four packages of American Tobacco cigarettes as part of their weekly compensation. Separate cafeterias are maintained for the employees of the two Companies, and recently separate first aid facilities were established. If, however, an employee of American Suppliers is seriously injured or takes seriously ill, he or she is sent to the American Tobacco Hospital, there being no such facilities at American Suppliers' plant.

Much testimony was heard to the effect that certain gates, or entrances, were normally used by American Suppliers employees and certain others by employees of American Tobacco, but at least one gate certainly was available to be used commonly by employees of both Corporations. The parking lot is also used by both Corporations. The power plant supplies steam to both Corporations, although Amer- [fol. 124] ican Tobacco renders statements according to "flow meter" readings to American Suppliers for the amount of steam that Corporation uses.

Under this set of facts the Union contends that its picketing against American Tobacco is primary and not secondary picketing.

At the outset the picketing was not peaceful. There was much testimony relative to the vulgar and insulting language used by pickets to other employees crossing the picket lines. Among other things, Union members are accused of having called those crossing the picket lines "hound dog". In a spirit of levity the Union insisted in Court that the term "hound dog" was not used as an insult but rather insisted that the pickets were merely repeating the words of a popular song, allegedly one of the current favorites on the radio. The Court would be inclined to accept this explanation if it were not for the fact that "hound dog" was one of much milder insults that the Union members were accused of employing. The Court is satisfied from the testimony that much stronger and much more vulgar and vituperative language was freely indulged in by the pickets.

Worse, however, than the language were acts of violence indulged in by the pickets. The Court is convinced that there was shoving and tripping of other employees. There was mass picketing. Auto tires of other persons were punctured. Ice picks were used. Roofing nails were scattered in driveways. On a few occasions bricks were hurled. Some damage, including a broken flood light, was caused. One truck had all four tires slashed. This conduct is inexcusable.

In addition there is evidence that the strike has been conducted in an atmosphere of threats.

[fol. 125] With this factual background, the Court is confronted with two serious legal issues. First, the Union contends that the Taft-Hartley Act vests the N. L. R. B. and Federal Authority with exclusive jurisdiction to enjoin picketing which amounts to a secondary boycott and, therefore, claims that this Court is without jurisdiction. Counsel cite a California case, Gerry of California vs. Superior Court, 194 P. (2d) 689, and a Minnesota case, Norris Grain Co. vs. Nordaas, 46 N. W. (2d) 94. Both involved acts amounting to secondary boycotting. In holding that the Federal Authority was exclusive, the California Court specifically based its opinion on the fact that the "Union objective and

the means employed to attain it were not unlawful insofar as the law of this State is concerned". The only challenge made against the Union activity was that it violated the Taft-Hartley Act.

The Minnesota case was a writ of prohibition proceeding in which the State Court was prohibited from proceeding with an injunction restraining the Union from engaging in picketing which amounted to a secondary boycott. Both the National Labor Relations Act and the Minnesota Act contained provisions outlawing secondary boycotts. The Court held that the Federal Act vested exclusive jurisdiction in the N.L.R.B. to enforce the provisions against secondary boycotting.

It does not appear that any contention was made before the Minnesota Court that State Courts have the power to protect the private property of the State's citizens against any otherwise unlawful acts committed against such private property. The only unlawful acts complained of were the secondary boycott acts, which were claimed to be unfair [fol. 126] labor practice contrary to both Minnesota and Federal law.

In the situation before this Court, counsel for the Union insists that, if the acts of the Union in picketing American Tobacco are unlawful in any way, they are unlawful only because they constitute a secondary boycott, and they, therefore, must come within the exclusive jurisdiction of the N.L.R.B. With this the Court cannot agree.

If the Union pickets American Tobacco when it has no dispute whatsoever with American Tobacco, (conceding for the purpose of this discussion that American Tobacco is a stranger to this labor dispute), and by so doing coerces or influences persons not to make deliveries of needed merchandise and material to American Tobacco, the American Tobacco Company is placed in position to suffer irreparable damages. A wrong has been committed against it for which there should be a remedy. It may be that wrong constitutes a secondary boycott which could give rise to a remedy under the Taft-Hartley Act. But that wrong also constitutes a violation of Kentucky law in a field not covered exclusively by the Federal Act. It is violative of the Kentucky Constitutional provisions, which seek to protect the private property of our citizens and also con-

trary to K.R.S. 336.130, not necessarily because it is a secondary boycott but because it is an unfair and illegal act calculated to cause irreparable damage to plaintiff.

The Court is fortified in its opinion by the recent opinion of the Court of Appeals in the Blue Boar Cafeteria Co. vs. Hotel and Restaurant Employees, 254 S. W. (2d) 335. There the question of the right peacefully to picket was held not to be exclusively a Federal question controlled [fol. 127] alone by the Freedom of Speech Amendment to the Federal Constitution, but, rather it was held to be determined by the public policy of Kentucky as announced in K.R.S. 336.130 and as interpreted by the Courts. This holding was in keeping with several decisions of the Supreme Court of the United States, cited in the opinion of the Blue Boar case. It is true that the Blue Boar case did not involved interstate commerce. However, in the opinion of this Court, the interstate commerce of plaintiff would deprive this Court of jurisdiction only if the sole basis of this Court's asserted jurisdiction was that the acts constituted a secondary boycott. Lay aside for the moment the issue of American Suppliers being a wholly owned subsidiary of American Tobacco. In the absence of that issue, the acts committed by the Union against American Tobacco would amount to a wrong against American Tobacco whether or not they also constitute a secondary boycott.

Numerous cases were cited by plaintiff sustaining the right of state courts to exercise traditional police power to suppress violence, protect property, etc. The following quotation from Erwin Mills vs. Textile Workers Union of America, C.I.O., 67 S. W. (2d) 372, 234 N.C. 321, is a clear statement of the function of the state courts in these matters:

> "In our opinion there is nothing in the provisions of the Taft-Hartley Act or in the decisions of the Supreme Court of the United States in construing the provisions thereof that interferes with the right of a State to exercise its traditional police power to suppress violence, to prevent breaches of the peace, to prevent an employer and his employees from being intimidated by [fol. 128] violence or the threat of violence or to protect property and to safeguard its lawful use during a strike or labor dispute. The proper exercise of such

power does not impinge upon the lawful rights of labor within the purview of the Constitution of this State, the Constitution of the United States, or the Taft-Hartley Act."

The other legal question arises from the American Tobacco Company's claim to be a total stranger to the labor dispute between the Union and American Suppliers. To support this claim, plaintiff relies upon the separate entities of the two Corporations and cites two cases involving labor matters, one the case of N.L.R.B. vs. Timken Silent Automatic Co., 114 F. (2d) 449 and State vs. Casselman, 205 P. (2d) 1131, an Idaho case.

It is not believed that the Timken case is authority on the issue here involved. There, the N.L.R.B. was attempting to enforce one of its orders against a subsidiary corporation and the court held that, in the absence of a showing that the parent corporation controlled the subsidiary in such manner as to bring about a wrong or a fraud, the two corporations could not be treated as one. The question there was the enforcement of an order against a corporation. It did not involve the question of whether the picketing of a parent corporation amounted to a primary rather than the secondary picketing. Even in the situation there considered, a strong dissenting opinion was written. The Idaho Court affirmed a conviction of pickets for engaging in secondary picketing contrary to an Idaho Statute. There, two subsidiary corporations of American Telephone and Telegraph Co., The Mountain States Telephone and Telegraph Co., and the Western Electric Company, both had labor disputes with different Unions. The Telephone Company settled its dispute, and the union of the Electric Com- [fol. 129] pany continued to picket the Telephone Company. Prosecution ensued.

It was contended by the Union that the picketing was primary and not secondary, because both Companies were wholly owned by American Telephone and Telegraph and, therefore, the corporate veil should be pierced. The Idaho Court held otherwise, pointing out that the operation of the two corporate entities was not shown to be a subterfuge or an invasion. The Court relied on the fact that Western Electric had been organized in 1881 and sold its products

in other fields than that engaged in by the Telephone Company and it also sold them throughout the United States, while the Telephone Company involved operated in only seven states.

The Court pointed out that both Unions and Employers recognized that the two labor disputes against the two different Companies were separate and distinct disputes. In making ultimate settlement of both labor disputes, both Unions and Employers treated and recognized the disputes as distinct from each other.

We do not have a similar situation here. The strike is not yet settled, and far from recognizing that American Tobacco is not a party to its dispute, the Labor Union is strenuously claiming that it is such party.

The Idaho Court also pointed out that it was stipulated therein that the parent Company, American Telephone and Telegraph had no power to represent the subsidiary and, hence, "no power to bind or control them, and the separate settlements show the constituent unions acquiesced in this. If the parent had no control, the subsidiary would have had even less over another subsidiary". The Idaho Court pointed out that these two subsidiaries were part of a [fol. 130] total of twenty-three corporate subsidiaries of the parent, American Telephone and Telegraph.

We do not have that situation here. It is true that Mr. Hager manages American Tobacco and Mr. Turner manages American Suppliers and locally have no control over each other. But, as pointed out above, it must be presumed that, since American Suppliers is a wholly owned subsidiary, in some higher echelon there is a common control over the local offices of both Corporations.

The right of a union to conduct a strike is a powerful weapon in its hands. The Taft-Hartley Act, other Federal Laws, and the laws of the Commonwealth of Kentucky all tend to sustain the right of the Union so to strike. Unquestionably, here the Union has the right to strike against American Suppliers as the primary employer of the Union. To hold that picketing American Tobacco Company would be secondary picketing rather than primary picketing solely on the ground that the two Companies have separate corporate entities might well serve to deprive the Union of the powerful weapon which our laws intend to preserve.

In 16 A.L.R. (2d) at page 778, the annotator discussing the effect of community of interest between primary and secondary employers upon the legality of an alleged secondary boycott, makes these very pertinent remarks:

> "An important factor in determining whether the activities of a union against an employer other than the one with which the union has a labor dispute come within the purview of the secondary boycott, is the relationship between the two employers. If the relationship is so close that one may be regarded as the [fol. 131] ally of the other, picketing of the one may be permissible during a labor dispute with the other."

An interesting case is that of Douds vs. Metropolitan Federation of Architects, 75 F. Supp. 672. That case involved the construction of Section 8 (b) (4) A of the Taft-Hartley Act, as applicable to a strike conducted by the union recognized by Ebasco Corporation, during which the union also picketed a partnership known as Project, which subcontracted much of Ebasco's work. Although the Corporation and partnership had no common ownership of any kind, the Court held the picketing to be primary rather than secondary. While it is true we are not here construing the Taft-Hartley Act, the Douds case is authority for the proposition that mere differences of legal entities, such as these two different corporate structures are not conclusive of the question of neutrality in a labor dispute. The District Judge had this to say on this question:

> "I am unable to hold that corporate ownership or insulation of legal interests between two businesses can be conclusive as to neutrality or disinterestedness in a labor dispute".
>
> And,
>
> "To suggest that Project had no interest in the dispute between Ebasco and its employees is to look at the form and remain blind to substance".

Unquestionably, American Tobacco is interested in American Suppliers' labor dispute. Geographically the two Companies are so closely enmeshed as to make it almost impos- [fol. 132] sible to separate them. Ownership of the two

Companies is identical. The only thing that separates the two Companies is corporate entity. In the opinion of this Court, this fact does not constitute American Tobacco a neutral or a total stranger in this strike. American Tobacco rather is an ally of American Suppliers.

In the case of Whitt vs. Stephens, 246 S. W. (2d) 996, the Court of Appeals of Kentucky refused to consider the opening of a new draft mouth in a seam of coal by the same owner to be such a different operation as to deny the right of the union men to picket the newly opened entrance, although the union had had a contract with the owner concerning the former entrance to this seam of coal only. Thus, identity of ownership has been considered by our Court of Appeals in a labor dispute, although the question of corporate entities was not considered.

In Boyd vs. Deena Artware, 239 S. W. (2d) 86, our Court of Appeals held that a union could picket not only the plant of the employer, but also the area immediately adjacent to the plant upon which an independent contractor was erecting a new plant for the employer. It might be said that in that case the Court of Appeals implied that, if the independent contractor had been seeking to enjoin the picketing and if such independent contractor could have established himself as a complete stranger to the labor dispute, the Court may have enjoined the picketing. As stated above, however, under the facts of this case, American Tobacco cannot be considered a complete stranger to the labor dispute.

It is, therefore, the opinion of the Court that the Union has the right peacefully to picket American Tobacco. Since the testimony in this case had disclosed that the picketing in this case has not been conducted in a peaceful atmosphere, an injunction should be granted but in different terms from [fol. 133] the restraining order. The number of pickets will be limited. All violence will be enjoined. Threats of injury and reprisal will be enjoined. Use of abusive language will be enjoined. Counsel will meet with the Court to discuss the exact terms of the injunction.

Contempt Proceeding

Along with the hearing on the injunction, the Court also heard a rule for contempt against various members of the

Union. This contempt arose out of the alleged refusal of certain members of the Union who were employed by the Bowling Green Express Company to handle merchandise for delivery to American Tobacco Company. The restraining order prohibited the members of the Union and its associates "from refusing or inducing, encouraging, or otherwise causing or arranging with, the employees of other employers, particularly common carriers, or with such employers to refuse to accept, handle, transport and deliver in accordance with their legal and contract obligations property shipped by or to plaintiff."

The seven employees of the Bowling Green Express Company attempted to excuse their conduct in failing to make deliveries by saying that they had not "directly" been asked to handle the merchandise until the morning of the day they testified in Court. The Court is convinced that, whether or not these seven members were directly asked to handle this goods for delivery to American Tobacco Company, all seven of them understood that they were being asked indirectly to handle the goods. The seven also professed to have had no knowledge of the restraining order that had been issued in this action. It is difficult for the Court to believe that these men had no knowledge whatsoever of the restraining order. It is true [fol. 134] that several of them testified that they didn't know what a restraining order was, but the Court feels that these seven men knew that some sort of Court Order existed and further knew enough about that Court Order to realize that it required them to make deliveries. The effect of their claimed ignorance of the restraining order is completely lost to them by reason of the fact that on the morning of the day on which they testified in Court, after knowing that a restraining order was in existence, these men defiantly and admittedly again refused to handle the deliveries.

The Court has already dismissed the contempt rule against Paul Priddy, Stoy Decker and Marion N. Winstead, for the reason that no testimony directly involved these three men in the disobedience of the Court's order. In addition to the seven employees of the Bowling Green Express Company, Virgil Denton was also accused of contempt. He was called over the telephone by Mr. Berry of the Bowling

Green Express Company and asked for assistance in getting the employees of Bowling Green Express to make the deliveries. Mr. Denton did not testify in Court but filed an affidavit explaining his conduct. The Court is not convinced from that affidavit that Mr. Denton had no part in encouraging the refusal to handle this goods for delivery to the plaintiff. He may not have directly refused or directly coerced, but he at least indirectly encouraged or induced the refusal. As Assistant Business Agent for the Union, it is believed that if Mr. Denton had acted as he should have under the circumstances the deliveries would have been made.

As it turns out, the Court is of the opinion that the restraining order was erroneous in that it went too far and [fol. 135] *in that it went too far and* in that it was based upon the theory that American Tobacco Company was a stranger to the labor dispute. Restraining orders, however, are necessarily issued in haste in order to prevent irreparable injury. Under certain circumstances restraining orders may be issued by a clerk in the absence of a judge of a court. Whether issued properly or erroneously, restraining orders must be obeyed. If improperly issued, the right place to correct the mistake is in Court. Persons affected by the order cannot take the law into their own hands and assume to disobey a court order. Consequently, it is the Court's judgment that Robert Smith, Charles Moore, Delmar Hightower, Jacob Lee, Jr., Christopher Evans, Ernest Spencer, Fred Ham and Virgil Denton are guilty of contempt and each is fined the sum of $30.00. No fine is levied against the Union in regard to these contempts for the reason that, although these persons may have acted in behalf of the Union in committing their individual contempts, there is considerable evidence that in regard to the delivery of other goods to the plaintiff the Union Officials strictly adhered to the restraining order.

(S.) Stuart E. Lampe, Judge.

[fol. 136] In Jefferson Circuit Court, Chancery Branch, Second Division

The American Tobacco Company, Inc., Plaintiff,

vs.

General Drivers, Warehousemen and Helpers Local Union #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., Is the Authorized Representative for the Purpose of Collective Bargaining of Employees of American Supplier, Inc., Defendants

Memorandum Opinion on Terms of Injunction—Filed April 23, 1953

• • •

The Court having authorized picketing of American Tobacco Company as well as American Suppliers, Inc., the plaintiff insisted that the temporary injunction heretofore issued requiring members of defendant Union, who were also employees of common or contract carriers, to continue to make deliveries to the plaintiff without discrimination.

Plaintiff insists that the threatened action of the members of the Union who are so employed to refuse to make deliveries to it is violative of K. R. S. 281.685 wherein a common carrier (similar provisions are also had for con-[fol. 137] tract carriers) is enjoined against subjecting any person to any unreasonable discrimination, and the penalty provisions of the same chapter, which in effect provide that any person who causes, aids or abets any violation of the above is doing an unlawful act.

Counsel for the Union insists that to require the members of the Union to make these deliveries in spite of their contract agreement to the contrary would amount to involuntary servitude and also a violation of the Taft-Hartley Act.

On the authority of the above mentioned provisions of the Statute, and on the authority of these two cases considering similar statutes, Burlington Transport Co. vs. Hathaway, 12 N.W. (2d) 167, an Iowa case, and Turner vs.

Zanes, 206 S.W. (2d) 144, a Texas case, the Court is of the opinion that appropriate language should be contained in the permanent injunction restraining any unlawful discrimination.

(S.) Stuart E. Lampe, Judge.

In Jefferson Circuit Court, Chancery Branch, Second Division

The American Tobacco Company, Inc., Plaintiff,

vs.

General Drivers, Warehousemen and Helpers Local Union #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an Unincorporated Labor Union, et al., Defendants

Judgment—Entered April 23, 1953

[fol. 138] At a Court held on April 22, 1953:

The Court, having considered the entire record herein, heard proof offered by both parties in open court, and considered further proof offered by affidavits and exhibits, and arguments of counsel, and being advised, rendered a written opinion on April 21, 1953, which is hereby made part of the record,

And the parties agreeing that the order heretofore issued herein on April 6, 1953, and denominated a "Restraining Order," having been issued upon notice and after hearing; may be considered a temporary injunction rather than a restraining order for all purposes of this action,

And the parties further agreeing that all the proof herein, including affidavits, may be considered by the Court as evidence upon the plaintiff's motion for a permanent injunction, as well as upon its motion for a temporary injunction and defendants' motion to dissolve the same, both of which agreements are hereby made a part of the record herein,

And the Court being of the opinion that the said tempo-

rary injunction, presently in effect should be modified, and a permanent injunction issued in lieu thereof, upon the terms hereinafter set out, and plaintiff and defendants all having advised the Court, as is now and hereby certified, that each of them desires to appeal to the Court of Appeals from the judgment modifying said temporary injunction and granting said permanent injunction,

It is ordered, that the temporary injunction heretofore in effect may be and hereby it is, modified and made into a permanent injunction, upon the following terms:

[fol. 139] **Permanent Injunction**

That the defendants, General Drivers, Warehousemen and Helpers, Local Union #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an unincorporated labor union; Paul W. Priddy, Joseph Burrell, Stoy Decker, Willard Marples, James Mallory, Alma Harper, individually, and as representatives of a class consisting of members of General Drivers, Warehousemen and Helpers, Local Union #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an unincorporated labor union, and each of them, and all members of said unincorporated labor union, and their confederates and associates, may be and hereby they are permanently enjoined:

1. From picketing or maintaining pickets or attempting to picket or maintain pickets at or about plaintiff's premises in excess of three pickets on each side (North, East, South, and West) plus one picket captain, making a maximum of thirteen persons at or about plaintiff's premises and within two hundred (200) feet thereof at any time;

2. From causing or threatening injury to the persons or property of the employees of plaintiff, or the physical property of plaintiff;

3. From using abusive, vile, profane, or threatening language to plaintiff's employees or others seeking to enter or leave plaintiff's premises or to do business with plaintiff;

4. From causing, aiding or abetting any common carrier or contract carrier unreasonably to discriminate

[fols. 140-142] against plaintiff by refusing while remaining an employee thereof, or inducing, encouraging, coercing or otherwise causing or arranging with common or contract carriers or any persons connected therewith to refuse to accept, handle, transport, and deliver, in accordance with their legal and contract obligations, property shipped by or to plaintiff, so long as property is being handled, transported and delivered by or to other customers of such contract or common carriers.

Provided, however, that for a period of twenty days from this date, to-wit, until May 12, 1953, at 5:00 o'clock P.M., or such earlier time as the Court of Appeals may order otherwise, the temporary injunction aforesaid of April 6, 1953, may be and hereby it is continued in force upon its original terms, and the terms of this permanent injunction shall be and become binding upon the dissolution or modification of said temporary injunction, unless the Court of Appeals shall order otherwise.

So long as said temporary injunction remains in force, the bond heretofore given by plaintiff herein shall remain in effect. To all of which the Plaintiff and Defendants object and except and pray in appeal to the Court of Appeals which is hereby granted.

(S.) Stuart E. Lampe, Judge.

(S.) Stites, Wood, Helm & Taylor, Counsel for Plaintiff.
(S.) Hardy & Logan, Counsel for Defendants.

[fol. 145] In Jefferson Circuit Court, Chancery Branch, — Division

[Title omitted]

Affidavit—Filed April 27, 1953

Affiant, J. D. Wilson, being first duly sworn, states that he is Manager of Middlewest Freightways, Inc., a common carrier by motor truck, with its Louisville headquarters at 1660 West Hill Street, Louisville, Kentucky; that on Monday, April 20, 1953, said carrier was requested by the American Tobacco Company, Inc., to pick up a shipment

to be carried to Kansas City, Missouri; that affiant directed Louie Leffew and J. C. Wilson, who are truck drivers employed by said carrier and members of General Drivers, Warehousemen and Helpers, Local Union #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an unincorporated labor union, to take a truck of said carrier to the factory of American Tobacco Company, at 17th and Broadway, in Louisville, Kentucky, and pick up said shipment; that said Leffew and Wilson took said truck and called the Union Hall of General Drivers, Warehousemen and Helpers, Local Union #89, International Brotherhood of Teamsters, Chauf- [fol. 144] feurs, Warehousemen and Helpers of America, A. F. of L., an unincorporated labor union, and requested advice as to whether or not they should pick up said shipment; that thereafter they did not pick up said shipment, but returned to the depot of said carrier without doing so and refused to pick up said shipment.

Affiant further states that at the time said truck drivers were requested to pick up said shipment, they were acquainted with and on notice of the restraining order heretofore issued in the above styled action on April 6, 1953.

(S.) J. D. Wilson.

Subscribed and sworn to before me by J. D. Wilson, this 23 day of April, 1953. (S.) John C. Klumb, Notary Public, Jefferson County, Kentucky. My commission expires Jan. 13, 1955. (Seal.)

[fol. 145] In Jefferon Circuit Court, Chancery Branch, Second Division

The American Tobacco Company, Inc., Plaintiff,

vs.

General Drivers, Warehousemen and Helpers, Local Union #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an Unincorporated Labor Union, et al., Defendants

Judgment on Rule—Entered May 4, 1953

[fol. 146] At a Court held on May 4, 1953:

The Court having considered the record herein and having heard proof offered by both parties in open court with respect to the Rule issued herein against General Drivers, Warehousemen and Helpers, Local Union #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an unincorporated labor union; Paul Priddy, Stoy Decker, Marion N. Winstead, Virgil Denton, Robert Smith, Charles Moore, Delmar Hightower, Jacob Lee, Jr., Christopher Evans, Ernest Spencer and Fred Ham, and being advised, having rendered a written opinion on April 21, 1953, which has heretofore been made part of the record,

It is ordered and adjudged that the Rule heretofore issued herein against General Drivers, Warehousemen and Helpers, Local Union #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an unincorporated labor union; Paul Priddy, Stoy Decker, Marion N. Winstead, Virgil Denton, Robert Smith, Charles Moore, Delmar Hightower, Jacob Lee, Jr., Christopher Evans, Ernest Spencer, and Fred Ham, be made absolute as to Virgil Denton, Robert Smith, Charles Moore, Delmar Hightower, Jacob Lee, Jr., Christopher Evans, Ernest Spencer, and Fred Ham, and that they, and each of them, is guilty of contempt of Court, and each of them is fined the sum of Thirty Dollars ($30.00) therefore; that said individuals and each of them shall make good his fine to the Commonwealth by the payment of said sum

of $30.00 within one week from the entry of this judgment, or shall be confined in the County Jail of Jefferson County, Kentucky, until the fine aforesaid shall be paid.

[fol. 147] It is further ordered and adjudged that the Rule as to General Drivers, Warehousemen and Helpers, Local Union #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an unincorporated labor union; Paul Priddy, Stoy Decker, and Mation N. Winstead, be dismissed.

(S.) Stuart E. Lampe, Judge.

[fol. 148] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 1-48] In Jefferson Circuit Court, Chancery Branch

Transcript of Evidence

John G. Hager called and testified in behalf of the plaintiff, being first duly sworn, was examined and deposed as follows:

Direct examination.

By Mr. Helm:

1 Q. Mr. Hager, will you give your name and position to the Court, please?

A. My name is John G. Hager and I am the Branch Manager of the Louisville Branch of the American Tobacco Company.

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[fols. 49-69] 21 Q. Mr. Hager in what state is the American Tobacco Company incorporated?

A. I think it is incorporated in the State of New Jersey.

22 Q. Do you know in what state American Suppliers, Incorporated, is incorporated?

A. I am not sure, I think maybe it is in the State of Delaware.

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[fol. 70] 89 Q. Now, Mr. Hager, I will ask you whether this picketing by Local 89 has caused any injury, loss, or expense to American Tobacco Company and, if so, the nature and extent of that?

A. Well, it is very complex—hard to answer.

Mr. Zollinger: I think the witness will be incompetent to testify, if it is speculative.

Witness: Your Honor, I would like to answer it.

Court: Let's hear the witness.

[fols. 71-73] A. Well, it caused us to completely revise our whole handling of all raw materials entering our property and shipping of all of our finished goods, and that compromises shipment of merchandise all over the United States. All of our materials and supplies come in normally, on about a fifty fifty basis; fifty percent of them probably coming in by Interstate Truck and the balance of them in railroad cars and of course due to the fact that the drivers were either members of the Teamsters Union or sympathetic to their cause, they refused to cross the picket lines so we were forced to ship by rail, and in many instances that caused an inconvenience, a longer haul and cost money. In addition to which, we had to employ more people, and we have had to do things that we normally wouldn't do in every day business, and I would say that the cost of all of it, if added up, would be a terrific amount of money, many thousands of dallars. How much, I don't know.

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[fol. 74] 107 Q. Who decides how much rent the American Suppliers pay the American Tobacco Company?

[fols. 75-93] A. That was determined in our New York office between the two companies.

108 Q. Who owns the stock of the American Suppliers?

A. I don't know exactly. I think the American Tobacco Company is the principal owner.

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[fol. 94] J. L. BIERY a witness called and testified in behalf of the plaintiff, being first duly sworn, was examined and deposed as follows:

Direct examination.

By Mr. Helm:

1 Q. Mr. Biery, will you give the reporter your full name, please?

A. J. L. Biery.

2 Q. What do you do?

A. Terminal manager for Bowling Green Express.

3 Q. Is that a common carrier motor truck?

A. Yes, common carrier.

4 Q. Do you have on your premises a shipment of tobacco for the American Tobacco Company?

A. Yes, sir, I do.

5 Q. Where did that come from, if you know?

A. From The American Tobacco at Nashville, Tennessee.

[fol. 95] 6 Q. Where is it addressed to?

A. To The American Tobacco Company at Louisville, Kentucky.

7 Q. At 17th and Broadway?

A. At 17th and Broadway plant.

8 Q. When did that shipment come in to your terminal?

A. It arrived in Louisville on the morning of April 9th.

9 Q. On that morning, did someone of The American Tobacco Company request that you deliver it?

A. Yes, sir. Mr. George Lody, the district traffic manager called me for delivery.

10 Q. What did you do?

A. We attempted to get it delivered, and at my instructions Henry Miller, who was acting foreman at the time, presented the bill covering the load to one of the tractor drivers, and he refused it. . . .

Mr. Zollinger: If the court please, will you instruct the witness to testify as to what he knows of his own knowledge.

Court: Just testify to that which you know of your own knowledge. You cannot testify as to what someone told you.

[fol. 96] A. I was informed. . . .

Mr. Zollinger: Objection.

Court: Sustained. You cannot testify as to what a third person told, unless that person is a party to this action.

(Off record remarks.)

Mr. Helm: You can testify as to what was told you by any person a member of Local 89.

A. I was told that none of the boys will take the load.

Mr. Zollinger: Objection.
Court: Sustained.

11 Q. Who told you that, Mr. Biery?

Mr. Zollinger: The objection has been sustained.
Mr. Helm: I am trying to bring out the fact that the man who told him is a member of Local 89.
Court: Objection overruled.

A. I will answer this way, Mr. Lody called and asked. . . .

Court: Who is Mr. Lody?
[fol. 97] Witness: He is district traffic manager of the American Tobacco Company.
Court: You cannot testify what he told you.
Witness: He called me for the load.

12 Q. What did you do after that?
A. I went back on the platform and wanted to know why the load was not out for delivery, and I was told by the acting foreman. . . .
13 Q. Is he a member of Local 89?
A. I believe he is, yes, sir.
14 Q. Do you know for sure that he is a member of Local 89?
A. Yes, he is.

Mr. Zollinger: Let the witness identify these people.

5 Q. Who were you talking to?
A. I was talking to Henry Miller, who was acting foreman and a member of Local 89.

Court: Mr. Zollinger, is Mr. Miller a member of Local 89?
Mr. Zollinger: Yes.
Court: Proceed, Mr. Witness.

A. (Cont.:) I then called Mr. Lody back and told him——
[fol. 98] Mr. Helm: Just a minute, you were going to tell about what happened between you and Henry Miller.

A. (Cont.:) Henry Miller told me that the load had been refused by the men who usually drive the tractors. This happened to be a trailer load.

Mr. Zollinger: I want to make a further objection.

(Off record remarks.)

Court: He can answer as to what he told him.

A. After I was told that no driver would take that load out, I contacted my steward, Mr. Bob Smith, who was at the time loading or unloading. He was at the Huber and Huber dock.

16 Q. Is he a member of Local 89?

A. Mr. Smith is a steward and a member of Local 89.

17 Q. Go ahead.

A. I asked Bob about this thing, and I said how come that we couldn't get that load delivered, and Bob told me that they could not deliver it, that there was labor trouble over at the American Tobacco Company, and there were general statements about unfair goods or hot goods or [fol. 99] something. I don't remember exactly what was said, and I told Bob at the time, I said, "Now, these people are calling for that load and they want it, and I want to know why it can't be delivered", and he said, "Well, the men can't touch it." So then I called the hall. I told Bob I was going to call the hall.

18 Q. What do you mean by the hall?

A. The Union hall.

19 Q. Local 89?

A. Yes, sir. I called the hall, and I got ahold of Mr. Denton.

20 Q. Who is he?

A. Mr. Denton is a business agent who we deal with, have been dealing with Mr. Denton for quite some years, and I asked Mr. Denton at the time what was going on, how come we couldn't get the load delivered, and Mr. Denton told me they were having labor trouble. He said the men were not going to touch it, and then I asked him about the possibility of American Tobacco Company coming over and

picking it up, and I was told that the men were not going to touch it. He said to me in the statement, and I told Virgil at the time, I said, "Virgil, whatever you tell me I [fol. 100] am going to tell American Tobacco, because I have got to get myself off the hook. We are a common carrier. We have got to make an attempt to deliver." Virgil said, "Well, the men are not going to touch it, but you can tell them this, that if American Tobacco wants to come over and pick up that shipment, they can do so", and I relayed that information to Mr. Lody.

21 Q. What happened after that?

A. That was about all for that day, and the next morning when I got down to the office, I had a phone call waiting again from Mr. Lody of The American Tobacco Company, and he questioned me again about the load, and I said, "Well, I don't know." I said, "I will go back and find out." I got hold of Bob Smith, the steward, member of Local 89, and Bob came into my office, and I talked to Bob about it, and he told me that nothing had changed, that that was that, and I said, "Well, why can't we handle it?", and he said, "Well, we just can't handle it", and I said, "On whose orders? American Tobacco Company wants to know who." He said he was told that at the hall, and I said, "Who at the hall?", and Bob said he didn't know. I said, "Well, let us get hold of the hall and find out", and then the conversation took place, and Bob handed me the [fol. 101] telephone, and he was talking to Virgil Denton. Mr. Denton talked with me, and then when I was satisfied that we weren't going to make any delivery, I asked Virgil about the possibility of unloading the trailer. I had a trailer tied up, and I thought I might need it, and Virgil said, "Well, I think we can arrange that", and I said, "Well, will you tell Bob that?", and he said, "Yes", and then I handed the phone to Bob, and after the conversation was concluded Bob told me that if we wanted it unloaded that he would, and I said, "O.K., I will see the foreman and see if he needs the trailer", and that concluded that day's work on the load. That happened to be a Friday. Nothing was done Saturday on it, because normally they don't work, and we just have a skeleton crew in to handle emergencies and what pick-ups we have to handle. Then this thing

started all over again Monday morning, and Mr. Lody called and wanted to know about this load, and he recited to me the fact that there was an order out, and I told him that I knew about that and I had told the men—that is, Bob Smith and also to Virgil, I mentioned about this court order, and I said, "You fellows have got me in the middle on it." I said, "Here is a man that says he doesn't have [fol. 102] labor trouble, he doesn't have a picket line, and there is a court order out, and he wants delivery and I can't do anything for him. What is the dope this morning?", and Bob told me then that there wasn't anything changed on it, and I don't remember who I got the information from, but . . .

Court: What date was this?

Witness: This was a Monday.

Court: What Monday?

Witness: April 13th, this past Monday.

A. (Cont.:) There were a lot of rumors flying around about deliveries or pick-ups or something being made over at American Tobacco, so I got in my car, and I went over, and there was a Craig trailer backed in American Tobacco, so I came back and I thought, well, maybe the thing has changed, and I checked again on the situation, and I contacted the hall and I got hold of the Union hall and got hold of Mr. Denton again and asked Mr. Denton about this thing, and I said, "Now, if these other lines are going in, it looks like we ought to be able to go in", and if I recall correctly, Virgil said to me, "That was unauthorized. We are not taking picks on you or any other line, that the situation is still the same." So I let it go at that. I gave that information to Mr. Lody. During the day then these [fol. 103] rumors kept flying about everybody getting into American Tobacco except us, and I did personally see Commercial Motor over there, and later on in the afternoon I saw some kind of a red tractor without identification pulling a Cochran Foil trailer, and some time later, about the time he pulled out, there was a Huber and Huber truck come in there. So, I called my foreman, and I asked my foreman, I said, "When Bob comes in, ask him what is going on." I said, "It looks like everybody is getting into

American Tobacco except Bowling Green Express", and when I got back into the office, Bob was there with Mr. Stoay Decker. They were in my office and were using the telephone, and I don't know anything about the conversation, but I started talking to him about the problem I had with this load of tobacco sitting in the yard, and Bob was there too, and the conversation went on about how come the other lines were getting in and so forth, and he said, "Well, you all can make deliveries."

22 Q. Who said that?

A. Mr. Stoay Decker said it. He said, "Well, there is nobody telling them not to make it", and I said, "Well, there has been." I said, "Mr. Denton told me that the boys could not handle that load", and Mr. Decker said, "Well, [fol. 104] that must be a mistake, because we are not telling anybody not to go in there", and I said, "Well, Bob, I guess we can make delivery." Bob kind of laughed, and he went on out. I wasn't expecting him to perform a miracle, but Mr. Decker did tell me, he said, "Well, I will take that up tonight and see what I can do for it." I said, "Well, I will sure appreciate it." I said, "It will get me off the spot." I said, "They have been wanting that load, and I can't do anything about it." But the next morning, which was yesterday morning, the load was still there, and I went back and had the acting foreman, Mr. Miller, present the bill to Mr. Smith and ask him if they could make a delivery on it, and he said no, nothing had changed, and Mr. Lody was informed of that. He asked for the load again yesterday, and nothing had changed on it. This morning I instructed Miller to put the bill out again or ask about it, and he asked about it, and nothing had changed. Now that is where I sit the load. When I was there, about eleven o'clock this morning, the load was still sitting back there in the lot where it was spotted, to my knowledge, the first day it come in. That is all I know about it.

23 Q. You have named Henry Miller, a member of Local [fol. 105] 89, as your assistant dock foreman, Bob Smith, a member of Local 89, as your dock steward. What other members of Local 89 are involved in what you have been telling us?

A. The tractor drivers, that are normally set out as

tractor drivers, are Bob Smith, Charlie Moore, Elmore Hightower, Jacob Lee, Jr., Christopher Evans, Ernest Spencer, and Fred Ham.

24 Q. Have you ever asked any of these men personally to deliver this merchandise?

A. No, sir, I have not, other than my conversations with Bob. Normally that function is performed by the foreman.

25 Q. Is that customary in your business?

A. It is at my place of business. I never give direct orders to the men.

Mr. Zollinger: At this time, Your Honor, I make a motion to strike all of his testimony with respect to the Union.

Court: As a member of the Union, I am going to permit it.

Mr. Zollinger: Exceptions, Your Honor.

26 Q. Mr. Biery, in your conversations with Denton, did he say anything to lead you to believe that the Union had [fol. 106] ordered these men not to handle this goods.

A. Well, the statements that I gave you I made a note of, and if I recall, the first day he specifically said there was labor trouble down there, and the men are not going to touch it, because the first day we could not get it loaded on the dock. It remained in the trailer, but the second day, when Mr. Denton said there would be no deliveries, I did ask him about getting that trailer unloaded if we needed it, and I said, "then if American Tobacco wants to pick it up off the dock, they can, and we will have our trailer." Then he made the arrangements there, apparently with Mr. Smith, to do it, because Bob told me he would do it if we wanted it, but we didn't need the trailer. It is still sitting down there.

27 Q. Did Denton tell you anything about possible trouble that the Union would cause to your men if they handled this shipment?

A. No, he made no reference to any trouble.

28 Q. Mr. Biery, what do you know, with respect to whether your men were advised of the restraining order in this case, when they found out about it, if they did?

[fol. 107] A. Well I was not at the office at the time that the restraining order was served. My chief clerk, Jim Tackett, accepted the order for me, and that is all I know

about the restraining order, the original order that came out, the restraining order. I was told that the . . .

Court: Sustain the objection.

29 Q. Were you told, or did you have any conversations with your men who were members of Local 89 as to whether they knew of the restraining order or not?

A. I called Bob Smith's attention to the restraining order when I asked him about delivering the load.

30 Q. When did you do that?

A. On each occasion when I contacted him about delivering the load, or asked him about the change, or why couldn't we get it delivered, I repeated the conversation that Mr. Lody put on me that there was no labor trouble and that there was a restraining order out.

31 Q. Did you ever talk to Mr. Winstead at the Union Hall about this matter?

[fol. 108] A. Yes. The first morning that this trouble came up—I think it was the first morning. I can tell you pretty quick—yes, after I had talked to Bob, I called the Union Hall, and I got hold of Mr. Winsted first, and I told him that I was trying to get hold of somebody about this situation, and he said that he would look into it and call me back, and in a few minutes, five or ten minutes, Mr. Denton called me back.

32 Q. Mr. Winsted was at the Union hall when you talked to him?

A. Yes, sir. I had no general conversation with him, other than trying to get hold of somebody who could tell me what was what.

Mr. Helm: That is all.

Cross-examination.

By Mr. Zollinger:

33 Q. Mr. Biery, there is a provision in the contract which you have with the Teamsters Union, is there not, that the members of the Teamsters Union cannot be required by the order to pass through any picket line?

A. Yes, sir, that is correct.

[fol. 109] 34 Q. Without reference to whose picket line it is?

A. It is a general statement, if I recall it correctly.

35 Q. The members of your work force are pretty generally advised of that condition in the contract, are they not?

A. I assume they are.

36 Q. They remind you of that, don't they?

A. Well, we have never had too much trouble with it, sir. Usually if there is a picket line, we don't request the men to go over it. They tell us that there is a picket line at such and such a place, and we let it go at that. We call the people and tell them the freight is there, and that is it.

37 Q. You had a personal conversation with Mr. Story Decker——?

A. Yes, sir.

38 Q. (cont.)—at which time he advised you that there must have been a mistake, that nobody was being stopped from going across there, is that correct?

A. Yes, sir, that was his conversation. I believe that was Monday or Tuesday he told me that.

[fols. 110-115] 39 Q. And that was after you had observed trucks of all companies going into The American Tobacco Company property?

A. Yes, sir, that was Monday, I believe.

40 Q. Yet you yourself were depending entirely on what your assistant foreman told you, with respect to refusal of delivery?

A. That is normal procedure with me.

41 Q. None of these men refused to you to handle it?

A. No, sir, not directly, no, sir. It is not my duty. I never contact the men directly to send them out on loads or anything, but I hire these other people for it, that is what I hire these other people for.

Mr. Zollinger: That is all.

(Witness excused.)

[fol. 116] GEORGE J. LODY a witness, called and testified in behalf of the plaintiff, being first duly sworn, was examined and deposed as follows:

Direct examination.

By Mr. Helm:

1 Q. Will you give the reporter your name and your position?

A. George J. Lody, district traffic manager at American Tobacco Company.

2 Q. You have held that position for over a month, I take it?

A. Yes, sir.

3 Q. Are you familiar with a shipment of tobacco sent from American Tobacco Company at Nashville to The American Tobacco Company at 17th and Broadway in Louisville via Bowling Green Express a few days ago?

A. I am.

4 Q. Do you know when that shipment arrived at the Bowling Green Express depot here?

[fol. 117] A. Well, I telephoned Mr. J. L. Biery on the morning of April 9th to determine whether or not the shipment had arrived and when it was going to be delivered, and he told me that it had . . .

Mr. Zollinger: Object.

Court: Sustained.

(Off record remarks.)

Witness: I don't know then. It had only what he told me.

5. Q. Did you ask him to deliver that to you that day?

A. I did.

6 Q. Did he deliver it?

A. He did not.

7 Q. Have you requested the delivery of that tobacco on any subsequent day, and if so, what days?

A. I requested it on the 10th, and I requested it on the 13th and on the 15th.

8 Q. That is today?

A. Yes, sir.

9 Q. And has it ever been delivered?

A. It has not.

10 Q. Have you talked to anybody else at Bowling Green Express regarding this shipment?

[fol. 118] A. I have not.

11 Q. I will ask you whether any other truck line, common carrier, has refused to accept any shipment offered by American Tobacco Company, or refused to deliver any shipment to The American Tobacco here since this strike began on March 30th?

A. There have been others.

12 Q. Tell us what you can about those cases, who you asked to do it and what happened?

A. Well, we had one case with the Federal Express.

13 Q. What happened, that you know of, in that case?

A. In that particular case, I telephoned their dispatcher, Mr. Rankin, and asked him to send a truck to our company for—to pick up a shipment going to Detroit.

14 Q. Did they send a truck?

A. He sent the truck about 9:45 A. M. on the 7th of April. The truck pulled into our yard on Broadway, and the driver came into the plant and asked to get at a telephone to call his hall and his boss. That truck left, and in the meantime I called and talked to Mr. Atterbury, the terminal manager, and he sent the truck back that after-[fol. 119] noon about 12:30, and we loaded that truck out to Detroit that day.

15 Q. So you were delayed for two or three hours that morning in getting your load moved?

A. Yes, sir.

16 Q. Do you know whether the driver was a member of Local 89? The driver on the first occasion?

A. Yes, sir, he was.

17 Q. Were there any other occasions when your traffic was delayed or refused?

A. We have had quite a few cases, but Mr. McCrory is more familiar with those—my assistant—that I am.

18 Q. Did you offer shipments to the Huber and Huber truck line on the 30th of March?

A. We did.

19 Q. What happened?

A. We sent our truck out there with the shipments, and

they refused to accept them, and our truck was returned to the plant with the shipment. I telephoned Mr. Huber who is Vice President of Huber and Huber.

20 Q. Don't testify as to what he said. You can tell what you told him.

[fol. 120] A. I told him that our truck had been returned to the plant and asked him whether or not he was going to receive our shipments, and after he had talked to the Union, he said he could not accept them.

Court: The court will sustain what he said. You can testify as to whether or not any shipments were accepted.

Witness: They were not accepted.

21 Q. Has Huber and Huber accepted any shipments from you since?

A. Not to my knowledge.

22 Q. Mr Lody, do you know anything about two trailers, they were semi-trailers, from Kalamazoo that were parked in your lot for a while?

A. Yes, sir, they were parked there for several days.

23 Q. Tell the Judge what you know about that.

A. Well, those two trailers were parked there for——

24 Q. How did they get there in the first place, if you know?

A. They were brought in by the Sutherland Paper Company, and we unloaded the trailers, and I don't know who told the men that they couldn't pull them out, but never-

[fol. 121] theless they stayed there, and they didn't pull them out.

25 Q. What did the drivers of those trucks do with those truck trailers ?

A. What did they do?

26 Q. Yes, when they got ready to leave the first time, what did they do?

A. They went out and talked to the man at the gates and didn't pull the trailers, left them there. What transpired at the gates I do not know.

27 Q. Did they take their tractors away with them?

A. They took the tractors with them.

28 Q. And how long were those trailers left at your loading dock?

A. They were left there—I don't know the exact date that they pulled them out.

29 Q. Do you know whether it was after the 6th of April, a week ago Monday?

A. I believe it was.

30 Q. And do you know whether they had been there since the preceeding Monday, March 30th?

A. They had, yes.

Mr. Helm: That is all.

[fol. 122] Cross-examination.

By Mr. Zollinger:

31 Q. Mr. Lody, you said that the drivers of these trucks went to the gate and were talking to the man at the gate. Do you mean there was a picket line out there at that time?

A. At that time there was.

32 Q. In other words, the incidence you are talking about was before the restraining order came out?

A. That is correct.

33 Q. And the incident with respect to the Federal Express Company occurred early in the morning of April 7th, the day after the restraining order was issued and before the restraining order had been brought up and sent up?

A. That was the morning of the 7th. We had no pickets.

34 Q. You had no pickets there; the pickets were taken off?

A. That is right.

35 Q. But you didn't see a copy of the restraining order before the 8th or 9th, did you?

[fols. 123-143] A. I think that was the 8th.

36 Q. Immediately after you conferred with the Federal Express Company, a truck came down and moved it, isn't that correct?

A. They didn't move it until the afternoon. The first truck went back.

37 Q. The first truck went back early in the morning, but then they came and they were permitted to move it without any interference at all, isn't that correct?

A. They moved it in the afternoon, yes.

38 Q. And wasn't that the same driver that had been there in the morning?

A. That was the same driver.

39 Q. On the Huber and Huber incident, that occurred immediately after the restraining order was issued too, did it not?

A. That occurred on March 30th.

40 Q. That was when the picket line was still up, wasn't it, when the picket line was still there that they refused to deliver?

A. They didn't refuse to deliver. They refused to accept our shipments that we delivered to them with our own trucks.

. . . . . .

[fol. 144] THEODORE D. MCCRORY a witness, called and testified in behalf of the plaintiff, being first duly sworn, was examined and deposed as follows:

Direct examination.

By Mr. Helm:

1 Q. Will you give the reporter your full name and your position?

A. Theodore D. McCrory.

2 Q. And what is your position, Mr. McCrory?

A. Assistant district traffic manager.

3 Q. For American Tobacco Company?

A. For American Tobacco Company.

4 Q. Have you held that position for some time now?

A. Yes, sir.

5 Q. Mr. McCrory, I will ask you whether, since the 30th of March this year, you have had any shipments to or from American Tobacco refused or delayed or held up by any of the common carrier truck lines carrying them or asked to carry them?

A. Yes, sir.

6 Q. Tell the court in your own words what has occurred. Don't tell what anybody else told you but what has occurred [fol. 145] in that connection?

A. Well, the first day that we had the picket line, Silver Fleet refused to accept any of our shipments, said their men would not handle them, due to the picket line at our plant. We had inbound shipment on Huber and Huber, and the dock steward refused to release the shipment. We had the same at Ziffrin Truck Lines, and we had the same condition at C and D. The shipments came in, and they refused to deliver them. Clements Truck Line, they refused to pick up shipments, and deliver too.

7 Q. Are there any others that you know of?

A. I think that covers about all of them.

8 Q. How about the Crutcher Truck Lines? Did you have any hold up with them?

A. Well, it was Crutcher Brothers Drayage Company. They brought a shipment to the plant and returned it to the shipper.

9 Q. When did that occur?

A. Last Friday.

10 Q. Do you know why they brought it to the plant and returned it to the shipper?

A. The driver stated that he was afraid . . . .

11 Q. Don't say what the driver stated. Do you know [fol. 146] anything about what happened when they came to the plant?

A. They refused to come in because of the picket line on 17th Street.

12 Q. Were they asked to come in on 17th Street? Where were they supposed to come in?

A. On Broadway between 17th and 18th.

13 Q. Was there any picket line at that entrance?

A. No, sir.

14 Q. Did they come in there?

A. No, sir.

15 Q. Did they go to 17th Street?

A. Yes, sir.

16 Q. Do you know the name of that driver?

A. His name is Offutt.

17 Q. When he went to the 17th Street gates, were there pickets at those gates?

A. There was a picket line back at the gate.

18 Q. Do you know whether or not he crossed those pickets?

A. No, sir, I don't.

19 Q. What did he do after that?

[fol. 147] A. He returned the shipment to the shipper.

20 Q. So the American Tobacco has never received it?

A. No, sir.

21 Q. With respect to the Clements Truck Line, what occurred with respect to them?

A. We had three separate shipments at Clements Truck Line that the driver refused to deliver to us at The American Tobacco Company dock on Broadway between 17th and 18th, and there was no picket line on Broadway.

22 Q. On what day was that that he refused to deliver?

A. Friday.

Mr. Zollinger: If it please the court, I would like the witness to be admonished to restrain himself for that which he knows of his own knowledge.

Court: Mr. McCrory, you may testify to anything that you yourself saw happen. You may testify to anything that a member of the Union told you. You cannot testify to what other persons who are not members of the Union might have told you. That would be heresay. You can [fol. 148] testify to what members of the Union told you, because they are parties to this action.

23 Q. What was it happened on April 10th?

A. That was the day that they were to deliver the three shipments, and the driver refused to come in.

24 Q. Did he come to the Broadway gate?

A. No, sir.

25 Q. Did he come to the plant at all?

A. He went to the side of the plant.

26 Q. Do you know what he did there?

A. He stopped where the picket line was, and then he went up Anderson Street, but he came up Broadway and turned south on 17th and east on Anderson.

27 Q. Did he ever come in to unload at all?

A. No, sir.

28 Q. Did you call up Clements Truck Line again after that?

A. Yes, sir.

29 Q. Did you ask them to deliver this material?

A. Yes, sir.

30 Q. Did they deliver them?

[fol. 149] A. No, sir.

31 Q. Have they ever delivered them?

A. Not that I know of, no, sir.

32 Q. As far as you know, they are still in the hands of the Clements Truck Line and have been since the 10th?

A. Yes, sir.

3 Q. Do you know what these shipments consist of?

A. There are two separate shipments of machine parts and one shipment of two drums of spices.

34 Q. Are they addressed to The American Tobacco Company?

A. Yes, sir.

35 Q. Do you know who they are coming from?

A. Two shipments of machine parts are from the Molins Machine Company of Richmond, Virginia, and the two drums are from The American Tobacco Company of Richmond, Virginia.

36 Q. Has Clements refused to pick up any of your outbound shipments?

A. Yes, sir.

37 Q. When did that occur?

A. Monday.

[fol. 150] 38 Q. The 13th?

A. Yes, sir, refused nine shipments.

39 Q. That was nine separate shipments?

A. Nine separate shipments of cigarettes.

40 Q. Who did you talk to at the Clements Truck Line about that?

A. Mr. Peloff, the manager.

Mr. Zollinger: Objection. He is not a member.

Court: Sustained.

Mr. Zollinger: Let it be stricken.

41 Q. Tell what happened with respect to the shipment which you mentioned with the C and D Truck Line.

A. Those were shipments of cigarettes and smoking tobacco out of Cincinnati to our jobbers in Louisville. I talked to Mr. Downs, the manager up there. He said that he couldn't . . . .

Mr. Zollinger: Objection.

Mr. Helm: Don't tell what he said.

42 Q. They were shipments from Cincinnati from The American Tobacco Company at Cincinnati?
A. Yes, sir.
43 Q. They were addressed to whom?
A. To the various jobbers in Louisville.
44 Q. They were not addressed to The American To-
[fols. 151-223] bacco Company factory in Louisville?
A. No, sir.
45 Q. What happened with respect to those shipments?
A. They were eventually delivered.
46 Q. Were they brought to Louisville by the C and D?
A. Yes, sir.
47 Q. Do you know whether the shipping bills called for delivery to the various local jobbers by C and D?
A. Yes, sir.
48 Q. Did C and D deliver them on schedule to those jobbers?
A. No, sir.
49 Q. What did they do?
A. They were delayed.
50 Q. For how long?
A. At least a day.

Mr. Helm: That is all.

* * * * * * *

[fols. 224-228] Paul W. Priddy called and testified in behalf of the defendants, being first duly sworn, was examined and deposed as follows:

Direct examination.

By Mr. Zollinger:

1 Q. Please state your name?
A. Paul W. Priddy.
2 Q. Are you a member of the Teamsters Local No. 89??
A. I am.
3 Q. Do you have an official position with that organization?
A. I do.

4 Q. What is that position?
A. President.

* * * * * * *

[fol. 229] 24 Q. On the issuance of the restraining order against the Local on April 6th, this year, how long after that order was issued did the Union remove the pickets from the Broadway side?

A. Word was sent immediately.

25 Q. Has there been any picketing by the Teamsters Union at any time since then?

A. On 17th Street, but not on Broadway.

26 Q. What instructions were given after the issuance of that restraining order to the Union members who are employed by the freight carriers?

A. That we were going to abide by the restraining order in the full sense of the word and that as long as this restraining order was on, saying we could not have pickets on Broadway, that these employees working for the Freight Companies, had no choice except to deliver the merchandise.

27 Q. Has that order ever been countermanded by the Union at any time, to your knowledge?

[fol. 230] A. Not to my knowledge. If it has been, it has been contrary to all orders that I have issued since this strike started.

28 Q. Have you had a general membership fee since this strike started, did you not?

A. Friday of last week.

29 Q. At that time, are all of the members of the Union supposed to be present at that time?

A. A general meeting solicits, asks for all the members working at any part of our Union for any company, who can find available time, to please come to that meeting. This is a meeting in which all of our by-laws and which all of our rules of order and which all of our officers are elected—the general meeting.

30 Q. At that meeting, which was held since the strike took place, what instructions were given to the members of the Union with respect to the observance of the restraining order?

A. I presided as the Chairman of the meeting, and dur-

ing that meeting a complete history of our efforts to negotiate a contract, first to win bargaining rights, and then negotiate a contract for the American Suppliers people, were given. A complete history of the restraining order was [fols. 231-242] given to the membership by me, and with a direct order from me that no pickets being on Broadway, that was in compliance with the restraining order; that they can do nothing but deliver, and should deliver to the American Tobacco Company, as long as it was not American Suppliers.

Court: What was the date of that meeting?
Witness: Friday, this past, your Honor. April 10th.

31 Q. Between the time of the restraining order and the time of the meeting, were there any other meetings or general meeting at which the employees of the freight transfer lines were present?

A. From the time of the restraining order?
32 Q. Yes.
A. No. However, all paid employees of the Union, who are assistant business agents, and everybody who asked, and everybody we came in contact with, were told that without pickets being on Broadway, deliveries could be made and should be made.

* * * * * * *

[fol. 243] Stoy Decker called and testified in behalf of the defendant, being first duly sworn, was examined and deposed as follows:

Direct examination.

By Mr. Zollinger:

1 Q. Please state your name?
A. Stoy Decker.
2 Q. Mr. Decker, do you have any official connection with [fols. 244-247] Local 89?
A. I am assistant business agent, but I don't know if it is official.

3 Q. How long have you been assistant business agent?
A. Two years.
4 Q. As such, are you in direct charge of the strike at the American Tobacco Company?
A. Yes.

* * * * * * *

[fol. 248] 27 Q. Since the time of the restraining order, what have your instructions been with respect to supplies going to the American Tobacco Company?
A. My instructions since the restraining order has been that no picket or anyone else interferes with shipments consigned to American Tobacco Company entering on Broadway, because we have no pickets there.
28 Q. Have you had occasion at various times to instruct [fol. 249] drivers who have voluntarily refused to deliver?
A. Yes, I have.
29 Q. Will you tell the Court what those occasions were?
A. One occasion was with the Bowling Green Express, Robert Smith, along with Jack Berry. I was there on the afternoon of Tuesday, this week, and I was talking to Robert Smith and Jack Berry in Jack Berry's office. He wanted to know why he could not pick up or deliver merchandise to the American Tobacco Company when his competitors were.

Mr. Helm: There is a lot of hearsay in this.

(Off record remarks.)

Court: He can testify what they had to say.

A. (Cont.) It is not hearsay, I was there. I talked to both Mr. Smith and Mr. Berry at the same time. I told Mr. Berry there was no reason why he could not pick up or deliver merchandise, at American Tobacco Company any time after the restraining order was issued, because we had issued instructions at the meeting to all of the membership to make deliveries there, and that other truck lines were doing that, that there was no reason why his people could not pick up and deliver merchandise to the [fol. 250] American Tobacco Company.

30 Q. Have there been any other occasions when you have intervened?

A. Yes, sir, I told Mr. Smith of Huber and Huber to make deliveries and he did make a delivery.

31 Q. Any other occasions?

A. I cannot remember the man's name, but one from Husmann and Roper Company, I told him to make deliveries and he did make a delivery.

32 Q. You have been observing the different companies making deliveries there, have you not?

A. Yes, sir.

33 Q. Tell the court the names of the various trucking companies handling freight—deliveries to the American Tobacco Company?

A. Husmann and Roper; Clements Truck Lines have been in there but I don't know what they delivered; I don't know what any of them delivered, but I know they have been in there; Johnson Freight Lines, Federal Express, and I believe, Huber and Huber, not sure about them.

34 Q. Does Local 89 have contracts with all of these companies?

[fols. 251-253] A. Yes, they do.

* * * * * * *

[fols. 254-348] 54 Q. Have you known of any inducement, encouragement, coercion, or conspiracy with the employees of the freight lines, to cause them to refuse to deliver goods to the American Tobacco Company? m

A. Not after April 6th, if that was the date of the restraining order, not after that.

* * * * * * *

[fol. 349] MR. ROBERT SMITH called and testified in behalf of the defendants, being reminded he was still under oath, deposed as follows:

Direct examination.

By Mr. Zollinger:

1 Q. Mr. Smith, is there a trailer at the docks of the Bowling Green Express containing tobacco consigned to the American Tobacco Company?

A. Yes, it is back against the fence.

Mr. Zollinger: That is all.

[fol. 350] Cross-examination.

By Mr. Helm:

3 Q. Have you or any of the other employees of the Bowling Green Express been asked to handle the load of tobacco?

A. I was asked directly yesterday.

4 Q. You say you were asked indirectly?

A. I never was asked directly until yesterday.

5 Q. Until yesterday?

A. Yes, sir.

6 Q. Yesterday morning?

A. Yes, sir.

7 Q. Did you handle the load?

A. No, sir.

8 Q. Why not?

A. Because there was labor trouble there.

9 Q. You refused to handle it on those grounds?

A. Yes, that was yesterday.

10 Q. How about today?

A. I was asked this morning to handle it.

11 Q. Did you again refuse to handle it?

A. Yes.

[fols. 351-352] 12 Q. On account of labor trouble?

A. Yes.

13 Q. You are a member of Local 89?

A. Yes.

* * * * * * *

[fol. 353] Mr. Charles Moore a witness, called and testified in behalf of the defendants, being first duly sworn, was examined and deposed as follows:

Direct examination.

By Mr. Zollinger:

1 Q. What is your name?
A. Charles Moore.
2 Q. Where do you work, Mr. Moore?
A. At Bowling Green Express.
3 Q. You were cited to come here, I believe, and show why you should — be ruled in contempt, is that right?
A. That is right.
4 Q. Have you ever refused to haul a load of tobacco consigned to the American Tobacco Company?
A. I never was asked until this morning.
5 Q. On April 9th, did anybody ask you to haul the load?
A. No.
[fol. 354] 6 Q. Is there a load of tobacco consigned to the American Tobacco Company . . .
A. Suppose to be, I have not seen it.

Mr. Zollinger: That is all.

Cross-examintion.

By Mr. Helm:

7 Q. When was that rule for contempt served on you?
A. If I am not mistaken, I think it was Monday morning. I think that is when it was given to me.
8 Q. Are you sure it was not earlier than that?
A. It might have been. They did not find me when they were hunting for me, because I was out on a run.
9 Q. Were you asked this morning to handle that load of tobacco?
A. I was.
10 Q. What did you answer?
A. No.
11 Q. Why?
A. Because there was labor trouble down there, and the

rest of them would not do it, so I would not do it either.

12 Q. Were the others asked to handle it?

A. Yes, they were all asked this morning.

[fol. 355] That is the only time I heard all of them being asked.

13 Q. Did they all refuse to handle it?

A. Those standing right there said, "no", yes.

14 Q. When did you first hear something about a restraining order that required the handling of this tobacco?

A. I don't know if it was Monday or Friday, they were looking for the steward, but the steward was not in.

15 Q. You did hear something then about a restraining order requiring them to handle it?

A. There was something, but what it was, I did not pay that much attention to it.

16 Q. And you did not try to find out?

A. No, I didn't.

Mr. Helm: That is all.

* * * * * * *

[fol. 356] DELMAR HIGHTOWER a witness, called and testified in behalf of the defendants, being first duly sworn, was examined and deposed as follows:

Direct examination.

By Mr. Zollinger:

1 Q. Please state your name.

A. Delmar Hightower.

2 Q. Where do you live, Mr. Hightower?

A. 2412 Griffin.

3 Q. Are you employed by the Bowling Green Express Company?

A. That is right.

4 Q. Mr. Hightower, were you ever requested to haul a load of tobacco from the Bowling Green Express Company to the docks of the American Tobacco Company?

A. Not directly until this morning.

* * * * * * *

[fol. 357] By Mr. Helm:

8 Q. Now you say you were not asked directly to handle this load, what do you mean by that?

A. I knew the load was there last Thursday or Friday, some time, and they come out with it, but they never asked me directly to carry it.

9 Q. What do you mean by "they didn't ask me directly"?

A. They asked if anybody wanted the load, just like that, but they did not come direct to me to take the load.

10 Q. You heard them ask that?

A. Something like that.

11 Q. And you did not take the load?

A. No, sir.

12 Q. Did you refuse to take it?

A. No, I never refused to take it until this morning.

13 Q. Were you asked this morning to take it?

A. I was.

14 Q. What was your answer?

A. "No."

15 Q. Why?

[fol. 358] A. Because of the trouble they are having up there.

16 Q. You knew there was a restraining order in court, didn't you?

A. Like I told you, I heard of it over the week end.

17 Q. But you knew this morning that there was one?

A. I knew of it yesterday.

18 Q. Do you know whether or not there is any picket line in fornt of American Tobacco Company?

A. I don't think so now. I have not been around American Tobacco.

19 Q. As far as you know, there is no picket line?

A. Not in front.

20 Q. So that you would not have to cross the picket line to deliver.

A. I figure this way, the American Tobacco and the American Suppliers are all the same thing.

21 Q. So it was on account of the labor trouble at American Suppliers that you refused to deliver?

A. That is right.

22 Q. In spite of the fact there was no picket line?

[fol. 359] A. Like I told you, labor trouble, and I just don't cross a picket line.

23 Q. Have you talked to anybody at all about that?

A. No, I have not.

24 Q. Who have you talked to about it?

A. We talked amongst ourselves about it.

25 Q. Who do you mean "we"?

A. The bunch at the Bowling Green Express.

26 Q. All the truck drivers?

A. Yes.

27 Q. When did you do that?

A. Maybe this morning, I don't remember the exact time.

28 Q. That is the first time you talked about it?

A. Well you know how things go around, you will talk.

29 Q. It has been there since last Thursday, has it not?

A. It came in Wednesday or Thursday, I don't know the exact date.

30 Q. And there has not been any talk about it until this morning?

[fols. 360-379] A. I have not talked so much about it because I was not interested.

31 Q. Have you heard any talk about it before today?

A. Sure.

32 Q. Who was saying that tobacco should not move?

A. Nobody.

33 Q. Did Bob Smith tell you that it should not be moved?

A. Bob Smith or nobody told me it should not move.

34 Q. But still you refused to handle it this morning?

A. That is right.

35 Q. Didn't you know that Local 89 wanted it moved?

A. I knew they did.

36 Q. You did?

A. Yes.

Mr. Helm: I have another question here.

* * * * * * *

[fol. 380] Mr. John G. Hager called and testified in behalf of the plaintiff, having been reminded he was still under oath, deposed as follows:

Direct Examination

By Mr. Helm:

1 Q. Mr. Hager, has any change occurred since yesterday when we were in court, in your relations with your employees, and if so what?

A. Yes, sir, the Firemen and Oilers have gone back to work.

* * * * * * *

[fols. 381-383] 5 Q. Has your plant been operating with reasonable efficiency since the strike started?

A. It was interfered with materially, during the strike.

6 Q. In what way?

A. We had difficulty getting our people in, and also our materials and supplies and tobacco.

7 Q. Was that because of the pickets on Broadway?

A. Materially so, yes.

8 Q. After the pickets were taken away, did you have any special difficulty in operations?

A. No, not so much.

* * * * * * *

[fols. 384-390] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 391] IN COURT OF APPEALS OF KENTUCKY

GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL UNION #89, ET AL., Appellants

vs.

THE AMERICAN TOBACCO COMPANY, INC., Appellee

JUDGMENT—June 2nd, 1953

The Court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed on both the original appeal and the cross appeal; which is ordered to be certified to said court.

It appears to the Court that an emergency exists in this case and a mandate shall issue forthwith without prejudice to the right to file a petition for rehearing.

It is further considered that the appellee recover of the appellant, its cost herein expended.

[fol. 392] IN COURT OF APPEALS OF KENTUCKY

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION #89, ET AL., Appellants

vs.

THE AMERICAN TOBACCO COMPANY, INC., Appellees

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division, Honorable Stuart Lampe, Judge

OPINION OF THE COURT BY JUDGE STEWART AFFIRMING ON THE APPEAL AND ON THE CROSS-APPEAL—June 2, 1953

Two questions are presented for determination on this appeal and cross-appeal:

1. Are the pickets around the property of the American Tobacco Company, herein referred to as "American," at 17th and Broadway Streets in Louisville, involved in primary or secondary picketing, since the strike is con-

ducted at the same address against American Suppliers, Incorporated herein called "Suppliers"?

2. May a driver of a common or contract carrier be compelled against his wishes by injunctive process to cross a picket line advertising a lawful strike, when the driver is a member of the same union that is conducting the strike but he is not on strike himself?

We have chosen to consider the cross-appeal, or question No. 1, first.

[fol. 393] On March 30, 1952, Local Union No. 89 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America of the American Federation of Labor, hereinafter referred to as "Local 89" for the stake of brevity, called a strike against Suppliers and threw picket lines around four of its establishments, viz.: A redrying plant at 9th and Magnolia Streets; an office with a small warehouse attached at 908 South 8th Street; a group of warehouses at 7th Street and Arcade Avenue; and a "stemmery" situated upon American's property at 17th and Broadway Streets. Suppliers is a subsidiary of American, but it is not a party to this appeal.

It is the picketing on all sides at the last mentioned location that is the bone of contention. The stemmery is situated on ground owned by American and is completely surrounded by American's cigarette factory, its auxiliary structures and its fences. American maintains that its main gates are on Broadway and that they are not and have never been used for ingress and egress of either personnel or materials of Suppliers except to some small extent. On the other hand it states that access can be had to Suppliers for all purposes from 17th Street. It is therefore perfectly practical, American argues, to set aside the entire side on Broadway for its exclusive use and thereby prevent it from becoming entangled in the labor dispute that exists only between Local 89 and Suppliers. Furthermore, American, asserts it is engulfed in this controversy solely because of its corporate and geographical relations with Suppliers, but that there is not now and there has never been any affiliation between its employees and Local 89, so that it is being subjected to a secondary boycott by the conduct of the union, and that the sphere of picketing can and should

be restricted to the disputants in such a manner as to relieve it from damaging results that flow therefrom. Local 89 takes the position that the picketing is primary, proper [fol. 394] and legal. The Chancellor adopted the view of Local 89, and American has cross-appealed from the judgment in this respect. Accordingly, we must search the record to resolve whether this finding has a reasonable basis in the evidence.

We have mentioned the physical layout of the stemmery. Aside from this, American and Suppliers have an economic interdependence; or, it might be said that Suppliers is the child of American, its parent, because the latter owns all the capital stock in the former. Suppliers buys raw tobacco and puts it through a certain process at the stemmery. The tobacco is then transported from the stemmery to American's cigarette factory by means of a conveyor belt which runs from one to the other. Suppliers sells all its tobacco to American. It was brought out that American owns not only the land but the improvements employed by Suppliers in the operation of the stemmery. There was testimony that Suppliers leased the ground and the plant and paid rent to American for the use of the same; however, the terms of the lease and the amount of the rent were unknown to the local officials of either corporation. A central power plant on the property supplies steam to the facilities of both corporations, Suppliers paying for this service. The trucks of Suppliers carry advertisements of "Lucky Strike," a well-known manufactured product of American. Over the entrance of another plant of Suppliers at 7th and Arcade Streets, which is not immediately connected with this litigation, the name on the sign reads: "American Tobacco Company." At times employees of Suppliers work for American and the latter pays the former for such services. Employees of Suppliers also receive four packages of American made cigarettes as a part of their weekly compensation. If an employee of Suppliers is badly injured or becomes seriously ill, that person is sent to American's hospital for treatment. To sum up, Suppliers and American operate as a unit, except that each is a corporate entity and each is under separate [fol. 395] management locally.

In the light of the foregoing factual background, we are confronted with this question: Is American a neutral in the existant dispute between Suppliers and Local 89? The test to be applied in arriving at a proper conclusion on this point may be thus stated: "An important factor in determining whether the activities of a union against an employer other than the one with which the union has a labor dispute come within the purview of the secondary boycott provision is the relationship between the two employers. If the relationship is so close that one may be regarded as the 'ally' of the other, picketing of one may be permissible during a labor dispute with the other." See 16 A. L. R., 2d, paragraph 6, page 6. However, we are not without precedent on this subject in this jurisdiction.

In the recent case of Local 181, etc. v. Broadway and Fourth Avenue Realty Company, Ky., 248 S. W. 2d 713, a strike involved a corporation which owned and operated the Brown Hotel and the Kentucky Hotel and another corporation which owned and operated the Martin Brown Building, all located in Louisville. Both corporations were, except for qualifying shares, entirely owned by Mr. Graham Brown. In this opinion, in passing on a centempt proceeding, we not only treated the whole controversy as a single labor dispute but we considered Mr. Graham Brown and the two corporations as in reality one and the same. There we said:

> "Supporting the conclusion that this is in the broad sense one labor dispute, is the fact that when the strike first commenced, picketing was begun at the Martin Brown Building, as well as the two hotels, although at that time there was no claim of a labor dispute affecting the employes of the Martin Brown [fol. 396] Building.
>
> "In the eyes of the public, this has been a strike against Mr. Graham Brown, and the acts of violence have been committed by persons having a labor dispute with Mr. Brown."

We think the industrial alliance between Suppliers and American is so close that both may be considered as one operation. From the standpoint of physical setup the two

are so enmeshed that they cannot be split apart without doing violence to both. To suggest that American has no interest in the dispute between Suppliers and Local 89 is to look at the form and remain blind to the substance. Nor can the naked claim of corporate separability be raised as a bar to picketing the primary employer at 17th and Broadway Streets. To remove the pickets from any side of this property would be to remove them from Suppliers at that location. It cannot, therefore, be said that American is a neutral under the circumstances and that the picketing amounts to a secondary boycott at the above address. We conclude that the Chancellor correctly disposed of this issue.

Local 89 seeks by its appeal to nullify so much of the injunction as requires a driver of a common or contract carrier to cross against his will a picket line where a strike is in progress. It so happens in this instance that the carrier employees are members of the same union as those conducting the strike against Suppliers. It should be emphasized, however, that they refuse to handle freight for American while remaining in the service of their employer.

The rule of law that common carriers and their employees must serve all members of the public without discrimination is firmly established in Kentucky and, so far as we can find, in all the states. Its origin goes far back into the common law. Section 196 of the Constitution of Kentucky [fol. 397] embodies the principle in this language: "Transportation of freight and passengers by railroad, steamboat or other common carrier, shall be so regulated, by general law, as to prevent unjust discrimination. No common carrier shall be permitted to contract for relief from its common law liability." Subsections 1 and 2 of KRS 281.685 read in part that no common or contract carrier shall "subject any person to any unreasonable discrimination." KRS 281.990(1) stipulates that any person who "violates, or causes, aids or abets any violation of, any of the provisions of this chapter." which includes KRS 281.685 (1) and (2), "Shall be fined not less than fifteen dollars nor more than two hundred dollars, or imprisoned for not more than thirty days or both."

The foregoing doctrine is set forth at length in 9 Am.

Jur., Carriers, section 286, pages 607-608, and in 13 C. J. S., Carriers, section 27, pages 61-62.

In Burlington Transp. Co., v. Hathaway (Iowa, 1943), 12 N. W. 2d 167, a suit was brought by certain common carriers as plaintiffs against the teamsters, chauffeurs, warehousemen and helpers union and its business agents as defendants to enjoin the latter from requiring employees of the union to refuse to handle the goods of John Blaul's Sons Company, a wholesale grocery company in Burlington, Iowa, which the union was attempting to organize. A picket line had been thrown around the grocery company and the employees of the union refused to transport freight for the grocery company. The Iowa statute as to non-discrimination by carriers is similar to Kentucky's. The substance of the court's decision is as follows:

> "When the plaintiffs obtained their permits to operate as common carriers, they undertook the duty to transport the freight which the public tendered to them for transportation. The failure to carry out [fol. 398] this duty to transport would not be excused by showing that its employees refused to obey the employers' order. See Chicago B. & Q. R. Co. v. Burlington C. R. & N. Ry. Co. et al., C. C., 34 F. 481, and Consolidated Freight Lines, Inc., et al. v. Department of Public Service, et al., 200 Wash. 659, 94 P. 2d 484, 485. In the last cited case a strike of laundry workers at the Davenport Hotel in Spokane resulted in a picket line around that hotel. Certain common carrier truck lines, who had been serving the hotel in the capacity of picking up freight or baggage and delivering it anywhere in the State of Washington or in the channels of interstate commerce, refused to send their trucks through the picket line at the hotel because the local manager of the teamsters' union threatened to call a strike of the carriers' drivers if they were permitted to go through the picket line. The hotel filed a complaint with the Department of Public Service against the carriers for the cancellation of their permits as common carriers. This resulted in an order suspending temporarily the permits under which the carriers operated. Upon appeal the action of the Commission

was affirmed, the Supreme Court of Washington stating: 'The question then arises whether the appellants were excused by reason of the law. They being common carriers, it was their duty, under the facts and [fol. 399] circumstances of this case, to send their trucks through the picket line. 13 C. J. S., Carriers, p. 407, sec. 202; Moore on Carriers, 2d Ed., Vol. 1, p. 124; Chicago, B. & Q. R. Co. v. Burlington, C. R. & N. Ry. Co., C. C. 34 F. 481; Burgess Bros. Co. v. Stewart, 112 Misc. 347, 184 N. Y. S. 199.'

• • • • • • •

"From the above it is clear that if the plaintiffs were to do that which the union sought to compel them to do, namely, not handle the Blaul merchandise, they would be doing an act prohibited by the common law and the statutory law of this state and an act that could subject them to criminal prosecution.

• • • • • • •

"There was no labor dispute between plaintiffs and their employees or between plaintiffs and the defendant union. The union cannot concertedly exert, in aid of their labor dispute with Blaul, any economic pressure to compel these plaintiffs to do that which the law and public policy forbid. The injunction was rightly issued."

These cases support the rule laid down in the Hathaway case: Pacific Gamble Robinson Co. v. Minneapolis & St. Louis R. Co., (D. C. Minn., 1952) 105 F. Supp. 794; Northwestern Pacific R. Co. v. Lumber & Sawmill Workers Union, etc., (Cal., 1948) 189 Pac. 2d 277; Turner v. Zanes, (Tex., 1947) 206 S. W. 2d 144.

[fol. 400] Counsel for Local 89 admit that the Hathaway case correctly sets forth the law on the issue raised by the appeal as of the date it was decided, namely, in 1943, but they insist that the Labor-Management Relations Act of 1947, commonly called the Taft-Hartley Act, 61 Stat. 136 (1947), 29 U. S. C. A., Sec. 151 et seq. (Supp. 1952), makes the question under discussion one exclusively con-

trolled by the above enactment. To fortify this position, reliance is had upon this part of 29 U. S. C. A., Sec. 158, also known as 8 (b) (4) (D), which is as follows: "• • • provided, that nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer) if the employees of such employer are engaged in a strike ratified or approved by representative of such employees whom such employer is required to recognize under this sub-chapter."

We do not agree with this line of reasoning. Section 8 (b) (4) (A), (B), (C) and (D) of the Labor-Management Relations Act of 1947 was clearly intended to outlaw only a secondary boycott, and such is not involved in the issue under consideration. See Picketing-Free Speech. Tanenhaus, Cornell Law Quarterly, Fall, 1952, Vol. 38, No. 1, pages 1 to 50; and see also the statement of Senator Taft in 93 Cong. Rec., Page 4198. Nor does the above quoted provision purport to make lawful any act which aside from the statute in question is unlawful. The appeal here involves the refusal of employees of carriers who happen to belong to Local 89, the bargaining representative of Suppliers' employees, to transport the merchandise of American through the picket line at 17th and Broadway Streets, and this disobedience is not complained of as an unfair labor practice but as a violation of the common law, the constitutional law and the statutory law of Kentucky. More than that, the illegal conduct of the employees could subject them to criminal prosecution. It follows [fol. 401] that the portion of the injunction requiring performance of the duty to carry American's goods in no way impairs the right to strike, the right to picket or any other right guaranteed by the federal law or the Constitution of the United States.

Finally, the employees of the carriers rely upon a provision of the agreement between themselves and their employers covering the period from February 1, 1952, to January 31, 1955, to the effect that it shall not be a violation of their contract of a cause for discharge to refuse to go through the picket line of a union or to refuse to handle unfair goods. They insist that this stipulation excuses them from serving

American. The legal duty of a common carrier to handle the merchandise of a shipper without discrimination existed long before the contract came into being, and, by like token, employees of common carriers, as long as they voluntarily remain in the hire of their employer, do not have the lawful right to withhold their services from a particular customer who deals with their employer. Where the common carrier and its employees seek by a contractual provision to avoid the responsibility imposed by statute, such a contractual provision is void. Such is the case here.

The question of whether a contempt has been committed is left for the Chancellor's determination. Our reason for this ruling is that the contempt, if any, is continuous in its nature and it should not be handled piecemeal. Besides, the chancellor is on the ground, is familiar with the background of this suit and is in a better position to hear the evidence; therefore, this phase of the case can be more expeditiously handled for all concerned in the lower court.

It appears to us that an emergency exists in this case and a mandate shall issue forthwith without prejudice to the right to file a petition for a rehearing.

The judgment is affirmed on the appeal and on the cross-appeal.

[fols. 402-405] Attorneys for Appellants: Hardy & Logan, 506 W. Jefferson St., Louisville, Kentucky; Robert Zollinger, Realty Building, Louisville, Kentucky.

Attorneys for Appellees: Nelson Helm, Stites, Wood, Helm & Taylor, Kentucky Home Life Bldg., Louisville, Kentucky.

[fol. 406] IN COURT OF APPEALS OF KENTUCKY

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION No. 89, et al., Appellants,

versus

THE AMERICAN TOBACCO COMPANY, INC., Appellee.

PETITION FOR REHEARING—Filed August 13, 1953

Ralph H. Logan, Marshall B. Hardy, Hardy & Logan, 506 West Jefferson Street, Louisville, Kentucky; Robert Zollinger, Citizen's Building, Louisville, Kentucky; Warren E. Hall, Jr., Counsel for Southern Conference of Teamsters, Atlanta, Georgia; David Previant, Counsel for Central Drivers Council, Milwaukee, Wisconsin, Attorneys for Appellants.

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* * * * * * *

[fol. 440] **Proposition of Law No. 4**

A State Court Is Without Jurisdiction to Enjoin the Employees of Carriers From Refusing to Handle Freight of a Shipper Involved in a Labor Dispute Under the Circumstances of the Instant Case.

A. With respect to carriers operating under certificates of convenience and necessity issued by the Interstate Commerce Commission:

(1) The Interstate Commerce Commission has exclusive original jurisdiction to determine the reasonableness of the failure of the carrier to furnish services.

A basic and controlling decision substantiating this proposition is that of *Loomis v. Lehigh Valley Railroad Company*, [fol. 441] 60 L. Ed. 517, 240 U. S. 43. In this case the Supreme Court of the United States made clear that prior resort to the Interstate Commerce Commission is an absolute condition precedent to the right to have a court determine the lawfulness of the failure of a carrier to perform a statutory duty. We will refer to this case at greater

length in a later discussion of actions in State courts. There can be no doubt that the general rule with respect to this question is that there must be prior resort to the administrative tribunal for a determination of the administrative question involved.

In *Great Northern* v. *Merchants Elevator Company*, 259 U. S. 285, Justice Brandeis, speaking for the Court, said:

> "Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be a preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative, in contradistinction to judicial. But ordinarily, the determining factor is not the character of the function, but the character of the controverted question and the nature of the inquiry necessary for its solution. To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the inquiry is essentially one of fact and of discretion in technical matters, and uniformity can only be secured if determination is left [fol. 442] to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts."

A further decision pertinent to this proposition, and one to which we will refer at length later in this brief because of its direct bearing on the instant case, is that of *New York Lumber Trade Association* v. *Lacey*, 269 N. Y. 595, 199 N. E. 688, cert. denied 298 U. S. 684, in which the highest court of the State of New York held:

> "For the reason stated, it may be assumed that it is the rule that, ordinarily complaints of unfair prac-

tices must be submitted in the first instance to the Commission. Claim is made by the respondents that the exception to this rule governs here, and that the unfair practice of which complaint is made, is, in reality, a discriminatory enforcement of a fair rule But manifestly the gravamen of the action is a rule promulgated by the carriers, which is of general application, and that is to deal with shippers only in the event their trucks are manned by union employees. It is the rule itself and not the enforcement thereof which is in issue here."

A case on this proposition very similar to the case at bar is *Midland Valley Railroad Company* v. *Barkley*, 276 U. S.482, 48 S. Ct. 342.

Other cases holding that exclusive primary jurisdiction for the determination of this and like questions is in the Interstate Commerce Commission are:

[fol. 443] *Robinson* v. *Baltimore & Ohio Railroad*, 222 U. S. 506, 32 S. Ct. 114;

Western Etc. Railroad v. *Georgia Public Service Commission*, 267 U. S. 493, 45 S. Ct. 409;

Board of Railroad Commissioners v. *Great Northern Railway Co.*, 281 U. S. 412, 50 S. Ct. 391;

St. Louis, Etc. Railway Company v. *Brownsville, Etc.*, 304 U. S. 295, 58 S. Ct. 868; and

Thompson v. *Texas-Mexican Railway Company*, 328 U. S. 134, 66 S. Ct. 937.

The general rule is, as set forth in the cases, that where reasonableness or legality of a party was subject to the Interstate Commerce Commission, "the court should stay its hand until the Commission has passed on the matter."

There are numerous other pertinent decisions to the same effect which will be discussed under the other subpropositions of this Proposition of Law No. 4.

(2) The Interstate Commerce Act supersedes and is superior to State law.

The entire matter of the duties and practices of common carriers in interstate commerce is covered by comprehen-

sive Federal regulation. See the three volumes reporting Title 49 of the U. S. Code.

Note that 49 U. S. C. A., Section 316 (d) provides:

". . . It shall be unlawful for any common carrier by motor vehicle engaged in interstate commerce . . . to subject any particular person . . . to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . ."

[fol. 444] Section 316 (e) of Title 49 U. S. C. A. provides:

"any person . . . may make complaint in writing to the commission that any such . . . practice is or will be in violation of this section or of Section 317 . . . Whenever . . . the Commission shall be of the opinion that . . . any practice whatsoever of such carrier or carriers . . . is or will be unjust or unreasonable, or unjustly discriminatory . . . *it shall determine and prescribe* the lawful . . . practice thereafter to be made effective and *the commission shall* . . . after hearing . . . *establish through routes . . . or practices* . . . and the terms and conditions under which such through routes are to be operated . . ." (Emphasis added.)

Moreover, Title 49, Section 322 (b) provides:

"If any motor carrier . . . operates in violation of any provisions of this chapter (except as to the reasonableness of rates, fares, or charges and the discriminatory character thereof) or any rule, regulation or requirement or order thereunder, or of any term or condition of any certificate or permit, *the Commission* or its duly authorized agent *may apply to the District Court of the United States* for the district where such motor carrier operates for the enforcement of such provision of this chapter, or of such rule, regulation, requirement, order, term or condition; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such carrier or broker, his

or its officers, agents, employees, and representatives from further violation of such provision of this chapter or of such rule, regulation, requirement, order, term, or condition and enjoining upon it or them obedience thereto." (Emphasis added.)

[fol. 445] The Federal Act represents a comprehensive effort on the part of the Federal Government to control in all ways and manners the transportation of goods in interstate commerce defining the duties and obligations of motor carriers engaged in such transportation, and setting up procedures for investigation and determination of alleged violations of their obligations and duties as common carriers. The Act was designed to achieve uniformity in the transportation system and to prevent imposition of conflicting duties and obligations by local regulation. By so doing, Congress has pre-empted the field (other than safety of highways), and has made it powerless for either state courts or state administrative bodies to act in such field. *Armour & Co.* v. *Alton R. R. Co.*, 312 U. S. 195, 85 L. Ed. 771, 61 S. Ct. 498; *Mitchell Coal & Coke Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 247, 50 L. Ed. 1472, 33 S. Ct. 916; *B. & O. Railroad Co.* v. *U. S. ex. rel. Pilcum Coal Co.*, 215 U. S. 481, 30 S. Ct. 164; *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350; *St. Louis, Brownsville & Mexico Ry. Co.* v. *Brownsville Navigation Dist.*, 304 U. S. 295, 82 L. Ed. 1357 at 1361; *T. & P. Railway* v. *American Tie & Timber Co.*, 234 U. S. 138, 34 S. Ct. 885; *Great Northern Ry. Co.* v. *Merchant's Elevator Co.*, 259 U. S. 285, 42 S. Ct. 477, 66 L. Ed. 943; *Terminal Warehouse Co.* v. *Pennsylvania Railway Company*, 297 U. S. 500, 56 S. Ct. 546. See also *Illinois C. R. Co.* v. *DeFuentis*, 236 U. S. 157, 35 Sup. Ct. 275, holding that State may not control the local interchange of interstate freight since this constitutes "a [fol. 446] part of interstate commerce, the regulation of which Congress has undertaken, and consequently the order of the state commission transcends the limits of its powers" 35 Sup. Ct. 275, 276.

The gist of the holding of all of these cases is that the adjudication of issues presented in the field of interstate transportation are necessarily complex ones of fact to which

a uniform law is to be applied, and that the ascertainment of the facts must be made by the special administrative body created by law for that purpose, and the law then applied to the facts as so determined.

In the *St. Louis, Brownsville & Mexico Railway case,* supra, which dealt with a factual situation arising in the State of Texas, the United States Supreme Court said:

> "The question whether the discrimination in the application of his (the carrier's) tariff covering the switching movement is unreasonable, is an administrative one. Appropriate consideration of it may extend to many facts and circumstances, including the influence, if any, of the discrimination upon the trustee's line hauls between other Texas ports and points in Mexico, and to the broad field of competition legitimately available to carriers, shippers and commodities seeking transportation between the United States and Mexico. And *the ascertainment of appropriate remedy for discrimination condemned calls for another administrative determination* involving, it may be, investigation of numerous conditions affecting transportation between the two countries. And *as determination of reasonableness of petitioner's refusal to furnish cars* [fol. 447] *for the transportation in question and the prescribing of change in the service, if any is to be ordered, are primarily within the regulatory powers of the Commission,* the district court rightly held that it was without jurisdiction and dismissed the cause. (Citing U. S. Supreme Court cases). The decree of the Circuit Court of Appeals must be REVERSED." (Emphasis added.)

If the rule were otherwise, the entire transportation system of the United States would be subject to the conflicting rules, decisions and injunctions of as many state courts and state administrative tribunals as there are in existence, and carriers could not know from one day to the next their duties or obligations as they travel from state to state, and are met with conflicting rules and injunctions in such states.

Similar holdings of the United States Supreme Court in-

validating State action with respect to matters about which the Federal Congress has legislated under the Commerce Clause are found in *New York Lumber Trades Ass'n* v. *Martin Lacey*, 281 N. Y. Sup. 647, affirmed *per curiam* 199 N. E. 688, and see the same case 200 N. E. 54, holding as follows:

> "This court having held that if there is any illegality in defendants' actions, it arises from encroachment upon rights regulated by the Shipping Act; and that while this court has jurisdiction of the labor unions, yet, the courts of this state shall not grant an injunction until the Shipping Board has by its order defined plaintiff's rights."

Certiorari was denied in 298 U. S. 684, 80 L. Ed. 1404, 56 S. Ct. 954. The same result is reached by the U. S. [fol. 448] Supreme Court in construing the United States Warehouse Act, 7 U.S.C.A. Sec. 241, et seq. See *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 67 S. Ct. 1146, where it was held at Page 1155:

> "Thus, by eliminating dual regulation and substituting regulation by one agency, Congress sought to achieve 'fair and uniform business practices' which as noted in Federal Compress & Warehouse Company v. McClean, supra, 291 U. S. at page 23, 54 S. Ct. at page 269, 78 L. Ed. 622, was the purpose of the amended Act."
>
> "The test, therefore, is whether the matter on which the state asserts the right to act, is in any way regulated by the Federal Act. If it is, the Federal scheme prevails although it is a more modest, less pervasive regulatory plan than that of the state . . ."

Federal Congressional intent that no injunction should issue in view of I.C.C.'s exclusive jurisdiction is apparent not only from the Interstate Commerce Act and the Motor Carrier Act discussed above, but likewise, from the language used in the Clayton Act, 15 U. S. Code, Section 26, which provides in substance that nothing contained in the Federal Anti-Trust Acts shall permit a suit for injunction

by any person, excepting only the Attorney General of the United States, where the matter complained of is:

> "subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."

In the case of *Central Transfer Company* v. *Terminal Railway Ass'n*, 288 U. S. 469, 53 S. Ct. 444, it was held that the obvious purpose of that provision was:

> [fol. 449] "to preclude any interference by injunction with any business or transactions of interstate carriers of sufficient public significance and importance to be within the jurisdiction of the Commission, except when the suit is brought by the Government itself."

Similarly, in *Terminal Warehouse Co.* v. *Penn. Ry. Co.*, 297 U. S. 500, 56 S. Ct. 546, it was pointed out that:

> "if a sufferer from the discriminatory acts of carriers . . . may sue for an injunction under the Clayton Act without resort in the first instance to the regulatory commission, the unity of the system of regulation breaks down beyond repair."

Congress thus dealt directly with the problem of State and Federal regulation of motor carrier transportation, either interstate or intra-state in character. Congress indicated no consent to share with the states its exclusive jurisdiction over the regulation of interstate commerce. If it had intended to do so that would have been the place to express such an intent. The language used reflected not merely an absence of Congressional consent to the sharing of its jurisdiction over any form of interstate commerce. On the contrary, especially when read with Section 203(b)(9), it evidenced a conscious Congressional dissent from any such sharing of its jurisdiction over this form of interstate commerce described in this legislation.

The Uniform Bill of Lading prescribed by the Interstate Commerce Commission and which has the force and effect of law reads:

> "except in case of negligence of the carrier (and [fol. 450] the burden to prove freedom from negligence

shall be on the carrier), the carrier shall not be liable for loss, damage, or delay resulting from riots or strikes."

(3) The Federal courts have exclusive jurisdiction to interpret, apply and enforce the Interstate Commerce Act.

The discussion under Section A (2) of Proposition of Law No. 4 above is applicable to this statement. It is academic that the federal district courts have exclusive jurisdiction to interpret, apply and enforce laws of the United States. The function of fixing responsibility for damages due to a strike is that of the Federal courts and not of the State courts. See *Adams Express Co.* v. *Croninger*, 226 U. S. 491, wherein the Supreme Court of the United States held:

> "That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under the bill of lading which he must issue and limits the power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulations or interference with it."

(4) The Federal rule as to reasonableness in such cases controls. This rule is that a labor dispute as in the instant case is sufficient to make the refusal reasonable.

The Federal rule was established as early as 1896 by the [fol. 451] Circuit Court of Appeals for the 8th Circuit in *Empire Transportation Company* v. *Philadelphia & R. Coal Co.*, 77 Fed. 919. This case involved a libel against a ship company for failure to promptly discharge a vessel. The defense was that the existence of a strike caused the delay and that the Company had exercised reasonable diligence. The Court held that the implied contract was to unload within such time as is "reasonable", in view of all existing facts and circumstances, ordinary and extraordinary, legitimately bearing upon that question at the time of the arrival and discharge of the vessel. The test then is the reasonableness of the excuse. In *Pennsylvania Railroad Co.* v.

Olivit Bros., 61 L. Ed. 908, 243 U. S. 574, the United States Supreme Court endorsed the principle enunciated in the *Empire Transportation Co. case* and held that a carrier might successfully defend against an action for failing to perform its statutory duty by showing that a strike or an accumulation of freight caused by a strike caused the delay in executing its contract to deliver the property. This problem is competently and thoroughly discussed by an expert in the field in an article appearing in the Minnesota Law Review of February 1949 (Pages 255-282). Mr. Charles H. Woods, Lecturer in Law at the University of Arizona College of Law and formerly General Attorney and General Solicitor for the A. T. and S. F. Railway Company under the caption "The Plight of a Strike-Bound Carrier". This same article is reprinted in the I.C.C. Practitioners' Journal, June 1949, Vol. XVI, No. 9. In closing a discussion on the rule in the Federal courts, Mr. Woods says:

> [fol. 452] "It is clear to the writer that there is a Federal rule on the subject of the carrier's liability for the consequences growing out of a strike, and that such Federal rule would prevail over any contrary State rule. It is equally clear that the rule established by the Federal decisions is the general rule of reasonable care under all the facts and circumstances prevailing at the time."

The rule as defined by Mr. Woods is well substantiated by decisions of the Interstate Commerce Commission. In *Montgomery-Ward & Company* v. *Chicago M. S. P. & P. Railway*, 268 I.C.C. 257, the complainant charged negligence against the railroad because it was alleged to have made no effort to secure or obtain non-union drivers, where both truck and rail employees of the carrier turned back at a picket line at the Company's place of business. The Commission dismissed the complaint, holding that it was clear from the testimony that an effort to employ non-union men to break the picket line would have resulted in a strike by the union trainmen and caused a complete stoppage of traffic with disastrous results to the public. The Commission in this case, and many others, recognized the general rule laid down by the courts that under the common law

the carrier was under no absolute duty to serve. The carrier was only required to exercise the diligence of an ordinary prudent man under the circumstances.

In *Consolidated Freightways*, 42 M.C.C. 225, the Commission said:

> "We find that the defendant's failure to serve the [fols. 453-464] complainant was primarily caused by a strike at complainant's plant, for which the defendants were not responsible, and that because of the strike they were physically prevented from serving the complainant, and accordingly their conduct was within the limitations and conditions of the applicable tariff with respect to impracticable operation and not unlawful. The relief sought is, in substance, an order to the defendants, commanding them to serve the complainant regardless of their incapacity to do so because of a strike and because of their labor agreements. As the defendants do not control the situation, *and as an order could not be directed against their employees, or the union*, the practical effect of such an order would be to embroil the defendants in a labor dispute with their own employees, and would merely add to the defendant's difficulties." (Emphasis added.)

Again quoting from the Commission in the *Consolidated Freightways* case:

> "Common carriers are bound to transport goods promptly, but they are not insurers of prompt transportation. Their duty is that of reasonable diligence. For mere delay not affecting the safety of the merchandise transported, there is no liability if due diligence is proved.
>
> "A common carrier's duty to receive and transport is not an absolute one, but is subject to reasonable limitations and conditions, and it may refuse to receive property for shipment if transportation on its lines, or the lines of a connecting carrier, has become impossible or impracticable because of circumstances beyond its control as for a strike, the strike not being induced or caused by the carrier."

[fols. 465-474] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

ORDER PERMITTING THE FILING OF ADDITIONAL AUTHORITY, ETC.—December 18, 1953

Came appellants, by counsel, and filed motion to file additional authority, which motion is sustained. 12/18/53.

[fol. 475] COURT OF APPEALS OF KENTUCKY

[Title omitted]

ORDER MODIFYING OPINION AND OVERRULING PETITION—February 5, 1954

The Court being sufficiently advised, the petition of appellants for a rehearing be and the same is hereby overruled, and opinion modified on its face.

[fol. 476] IN COURT OF APPEALS OF KENTUCKY

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION #89, et al., Appellants

vs.

THE AMERICAN TOBACCO COMPANY, INC., Appellees

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division, Honorable Stuart Lampe, Judge

OPINION OF THE COURT BY JUDGE STEWART AFFIRMING ON THE APPEAL AND ON THE CROSS-APPEAL—June 2, 1953

Two questions are presented for determination on this appeal and cross-appeal:

1. Are the pickets around the property of the American Tobacco Company, herein referred to as "American," at 17th and Broadway Streets in Louisville, involved in pri-

mary or secondary picketing, since the strike is conducted at the same address against American Suppliers, Incorporated, herein called "Suppliers"?

2. May a driver of a common or contract carrier be compelled against his wishes by injunctive process to cross a picket line advertising a lawful strike, when the driver is a member of the same union that is conducting the strike but he is not on strike himself?

We have chosen to consider the cross-appeal, or question No. 1, first.

[fol. 477] On March 30, 1952, Local Union No. 89 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America of the American Federation of Labor, hereinafter referred to as "Local 89" for the stake of brevity, called a strike against Suppliers and threw picket lines around four of its establishments, viz.: A redrying plant at 9th and Magnolia Streets; an office with a small warehouse attached at 908 South 8th Street; a group of warehouses at 7th Street and Arcade Avenue; and a "stemmery" situated upon American's property at 17th and Broadway Streets. Suppliers is a subsidiary of American, but it is not a party to this appeal.

It is the picketing on all sides at the last mentioned location that is the bone of contention. The stemmery is situated on ground owned by American and is completely surrounded by American's cigarette factory, its auxiliary structures and its fences. American maintains that its main gates are on Broadway and that they are not and have never been used for ingress and egress of either personel or materials of Suppliers except to some small extent. On the other hand it states that access can be had to Suppliers for all purposes from 17th Street. It is therefore perfectly practical, American argues, to set aside the entire side on Broadway for its exclusive use and thereby prevent it from becoming entangled in the labor dispute that exists only between Local 89 and Suppliers. Furthermore, American asserts it is engulfed in this controversy solely because of its corporate and geographical relations with Suppliers, but that there is not now and there has never been any affiliation between its employees and Local 89, so that it is being subjected to a secondary boycott by the

conduct of the union, and that the sphere of picketing can and should be restricted to the disputants in such a manner as to relieve it from damaging results that flow therefrom. Local 89 takes the position that the picketing is primary, proper and legal. The Chancellor adopted the view of [fol. 478] Local 89, and American has cross-appealed from the judgment in this respect. Accordingly, we must search the record to resolve whether this finding has a reasonable basis in the evidence.

We have mentioned the physical layout of the stemmery. Aside from this, American and Suppliers have an economic interdependence; or, it might be said that Suppliers is the child of American, its parent, because the latter owns all the capital stock in the former. Suppliers buys raw tobacco and puts it through a certain process at the stemmery. The tobacco is then transported from the stemmery to American's cigarette factory by means of a conveyor belt which runs from one to the other. Suppliers sells all its tobacco to American. It was brought out that American owns not only the land but the improvements employed by Suppliers in the operation of the stemmery. There was testimony that Suppliers leased the ground and the plant and paid rent to American for the use of the same; however, the terms of the lease and the amount of the rent were unknown to the local officials of either corporation. A central power plant on the property supplies steam to the facilities of both corporations, Suppliers paying for this service. The trucks of Suppliers carry advertisements of "Lucky Strike," a well-known manufactured product of American. Over the entrance of another plant of Suppliers at 7th and Arcade Streets, which is not immediately connected with this litigation, the name on the sign reads: "American Tobacco Company." At times employees of Suppliers work for American and the latter pays the former for such services. Employees of Suppliers also receive four packages of American made cigarettes as a part of their weekly compensation. If an employee of Suppliers is badly injured or becomes seriously ill, that person is sent to American's hospital for treatment. To sum up, Suppliers and American operate as a unit, except that each is a corporate entity [fol. 479] and each is under separate management locally.

In the light of the foregoing factual background, we are confronted with this question: Is American a neutral in the existant dispute between Suppliers and Local 89? The test to be applied in arriving at a proper conclusion on this point may be thus stated: "An important factor in determining whether the activities of a union against an employer other than the one with which the union has a labor dispute come within the purview of the secondary boycott provision is the relationship between the two employers. If the relationship is so close that one may be regarded as the 'ally' of the other, picketing of one may be permissible during a labor dispute with the other." See 16 A. L. R., 2d paragraph 6, page 6. However, we are not without precedent on this subject in this jurisdiction.

In the recent case of Local 181, etc. v. Broadway and Fourth Avenue Realty Company, Ky., 248 S.W. 2d 713, a strike involved a corporation which owned and operated the Brown Hotel and the Kentucky Hotel and another corporation which owned and operated the Martin Brown Building, all located in Louisville. Both corporations were, except for qualifying shares, entirely owned by Mr. Graham Brown. In this opinion, in passing on a contempt proceeding we not only treated the whole controversy as a single labor dispute but we considered Mr. Graham Brown and the two corporations as in reality one and the same. There we said:

> "Supporting the conclusion that this is in the broad sense one labor dispute, is the fact that when the strike first commenced, picketing was begun at the Martin Brown Building, as well as the two hotels, although at that time there was no claim of a labor dispute affecting the employees of the Martin Brown Building. [fol. 480] "In the eyes of the public, this has been a strike against Mr. Graham Brown, and the acts of violence have been committed by persons having a labor dispute with Mr. Brown."

We think the industrial alliance between Suppliers and American is so close that both may be considered as one operation. From the standpoint of physical setup the two are so enmeshed that they cannot be split apart without

doing violence to both. To suggest that American has no interest in the dispute between Suppliers and Local 89 is to look at the form and remain blind to the substance. Nor can the naked claim of corporate separability be raised as a bar to picketing the primary employer at 17th and Broadway Streets. To remove the pickets from any side of this property would be to remove them from Suppliers at that location. It cannot, therefore, be said that American is a neutral under the circumstances and that the picketing amounts to a secondary boycott at the above address. We conclude that the Chancellor correctly disposed of this issue.

Local 89 seeks by its appeal to nullify so much of the injunction as requires a driver of a common or contract carrier to cross against his will a picket line where a strike is in progress. It so happens in this instance that the carrier employees are members of the same union as those conducting the strike against Suppliers. It should be emphasized, however, that they refuse to handle freight for American while remaining in the service of their employer.

The rule of law that common carriers and their employees must serve all members of the public without discrimination is firmly established in Kentucky and, so far as we can find, in all the States. Its origin goes far back into the common law. Section 196 of the Constitution of Ken- [fol. 481] tucky embodies the principle in this language: "Transportation of freight and passengers by railroad, steamboat or other common carrier, shall be so regulated, by general law, as to prevent unjust discrimination. No common carrier shall be permitted to contract for relief from its common law liability." Subsections 1 and 2 of KRS 281.685 read in part that no common or contract carrier shall "subject any person to any unreasonable discrimination." KRS 281.990(1) stipulates that any person who "violates, or causes, aids or abets any violation of, any of the provisions of this chapter," which includes KRS 281.685 (1) and (2), "shall be fined not less than fifteen dollars nor more than two hundred dollars, or imprisoned for not more than thirty days or both."

The foregoing doctrine is set forth at length in 9 Am.

Jur., Carriers, section 286, pages 607-608, and in 13 C.J.S., Carriers, section 27, pages 61-62.

In Burlington Transp. Co. v. Hathaway (Iowa, 1943), 12 N.W. 2d 167, a suit was brought by certain common carriers as plaintiffs against the teamsters, chauffeurs, warehousemen and helpers union and its business agents as defendants to enjoin the latter from requiring employees of the union to refuse to handle the goods of John Blaul's Sons Company, a wholesale grocery company in Burlington, Iowa, which the union was attempting to organize. A picket line had been thrown around the grocery company and the employees of the union refused to transport freight for the grocery company. The Iowa statute as to nondiscrimination by carriers is similar to Kentucky's. The substance of the Court's decision is as follows:

> "When the plaintiffs obtained their permits to operate as common carriers, they undertook the duty to transport the freight which the public tendered to them for transportation. The failure to carry out this [fol. 482] duty to transport would not be excused by showing that its employees refused to obey the employers' order. See Chicago B. & Q. R. Co. v. Burlington, C. R. & N. Ry. Co. et al., C. C., 34 F. 481, and Consolidated Freight Lines, Inc., et al. v. Department of Public Service, et al., 200 Wash. 659, 94 P. 2d 484, 485. In the last cited case a strike of laundry workers at the Davenport Hotel in Spokane resulted in a picket line around that hotel. Certain common carrier truck lines, who had been serving the hotel in the capacity of picking up freight or baggage and delivering it anywhere in the State of Washington or in the channels of interstate commerce, refused to send their trucks through the picket line at the hotel because the local manager of the teamsters' union threatened to call a strike of the carriers' drivers if they were permitted to go through the picket line. The hotel filed a complaint with the Department of Public Service against the carriers for the cancellation of their permits as common carriers. This resulted in an order suspending temporarily the permits under which the carriers operated. Upon appeal the action of the Commission was affirmed,

the Supreme Court of Washington stating: 'The question then arises whether the appellants were excused by reason of the law. They being common carriers, it was their duty, under the facts and circumstances of [fol. 183] this case, to send their trucks through the picket line. 13 C.J.S., Carriers, p. 407, sec. 202; Moore on Carriers, 2d Ed., Vol. 1, p. 124; Chicago, B. & Q. R. Co. v. Burlington, C. R. & N. Ry. Co., C. C., 34 F. 481; Burgess Bros. Co. v. Stewart, 112 Misc. 347, 184 N. Y. S. 199.'

* * * * *

"From the above it is clear that if the plaintiffs were to do that which the union sought to compel them to do, namely, not to handle the Blaul merchandise, they would be doing an act prohibited by the common law and the statutory law of this state and an act that could subject them to criminal prosecution.

* * * * *

"There was no labor dispute between plaintiffs and their employees or between plaintiffs and the defendant union. The union cannot concertedly exert, in aid of their labor dispute with Blaul, any economic pressure to compel these plaintiffs to do that which the law and public policy forbid. The injunction was rightly issued."

These cases support the rule laid down in the Hathaway case: Pacific Gamble Robinson Co. v. Minneapolis & St. Louis R. Co., (D. C. Minn., 1952) 105 F. Supp. 794; Northwestern Pacific R. Co. v. Lumber & Sawmill Workers Union, etc., (Cal., 1948) 189 Pac. 2d 277; Turner v. Zanes, (Tex., 1947) 206 S.W. 2d 144.

[fol. 484] Counsel for Local 89 admit that the Hathaway case correctly sets forth the law on the issue raised by the appeal as of the date it was decided, namely, in 1943, but they insist that the Labor-Management Relations Act of 1947, commonly called the Taft-Hartley Act, 61 Stat. 136 (1947), 29 U.S.C.A., Sec. 151, et seq., (Supp. 1952), makes the question under discussion one exclusively controlled by

this enactment. To fortify this position, reliance is had upon this part of 29 U. S. C. A., Sec. 158, also known as 8 (b) (4) (D) of the Act, which is as follows: " • • • • provided, that nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer) if the employees of such employer are engaged in a strike ratified or approved by representative of such employee whom such employer is required to recognize under this sub-chapter."

The appeal involves the refusal of employees of common or contract carriers who are not on strike but who happen to belong to Local 89, the bargaining representative of Suppliers' employees to transport the merchandise of American through the picket line at 17th and Broadway Streets, and this disobedience is not complained of as an unfair labor practice but as a violation of the common law, the statutory law and the Constitution of Kentucky. Aside from this, as we have shown, the illegal conduct of the employees could subject them to criminal prosecution. We find nothing in the provisions of the above Act or in the decisions of the Supreme Court of the United States construing it that makes such conduct legal when from time immemorial the several states have branded it as illegal. Furthermore, the Supreme Court has taken the position that federal jurisdiction cannot be invoked to protect a course of action, such as that in this case, that would be in conflict with the declared public policy of a state. See Local Union No. 10 [fol. 485] v. Graham, 344 U.S. 811, and the cases cited therein. It follows that the portion of the injunction requiring performance of the duty to carry American's goods in no way impairs the right to strike, the right to picket or any other right guaranteed by the federal law or the Constitution of the United States but that the order does, on the contrary, enforce obedience to the law and Constitution of the Commonwealth and, as a consequence, it was proper.

Finally, the employees of the carriers rely upon a provision of the agreement between themselves and their employers covering the period from February 1, 1952, to January 31, 1955, to the effect that it shall not be a violation of their contract or a cause for discharge to refuse to go through the picket line of a union or to refuse to handle

unfair goods. They insist that this stipulation excuses them from serving American. The legal duty of a common carrier to handle the merchandise of a shipper without discrimination existed long before the contract came into being, and, by like token, employees of such carriers, as long as they voluntarily remain in the hire of their employer, do not have the lawful right to withhold their services from a particular customer who deals with their employer. Here the common carrier and its employees seek by a contractual provision to avoid the responsibility imposed by a statute which implements a constitutional provision, and we hold that such a contractual stipulation is void.

The question of whether a contempt has been committed is left for the Chancellor's determination. Our reason for this ruling is that the contempt, if any, is continuous in its nature and it should not be handled piecemeal. Besides, the Chancellor is on the ground, is familiar with the background of this suit and is in a better position to hear the evidence; therefore, this phase of the case can be more expeditiously handled for all concerned in the lower court. [fol. 486] It appears to us that an emergency exists in this case and a mandate shall issue forthwith without prejudice to the right to file a petition for rehearing.

The judgment is affirmed on the appeal and on the cross-appeal.

Attorneys for Appellants: Hardy and Logan, 506 W. Jefferson St., Louisville, Kentucky, Robert Zollinger, Realty Building, Louisville, Kentucky.

Attorneys for Appellees: Nelson Helm, Stites, Wood, Helm & Taylor, Kentucky Home Life Building, Louisville, Kentucky.

[fol. 487] In Court of Appeals of Kentucky

Judge's Certificate

I hereby certify that the Court of Appeals of Kentucky did consider the points raised in the Appellants Petition for Rehearing in the case of General Drivers, Warehousemen, et al vs. The American Tobacco Company, Inc. at its winter term and that the Court rejected the points raised therein

and on February 5, 1954 overruled Appellants motion for rehearing and modified the Court's opinion on its face.

Brod. M. Stewart, Acting Chief Justice of Court of Appeals of Kentucky.

[fol. 488] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 489-491] Supreme Court of the United States

[Title omitted]

Order Extending Time to File Petition for Writ of Certiorari—Filed April 23, 1954

Upon consideration of the application of counsel for petioner(s),

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 3rd, 1954.

Stanley Reed, Associate Justice of the Supreme Court of the United States.

Dated this 23rd day of April —, 1954.

[fol. 492] [File endorsement omitted]

[fols. 493-494] Supreme Court of the United States
October Term, 1954

No. 186

[Title omitted]

Order Allowing Certiorari—Filed October 14, 1954

The petition herein for a writ of certiorari to the Court of Appeals of the Commonwealth of Kentucky is granted.

The Solicitor General is invited to file a brief setting forth the views of the National Labor Relations Board.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 495] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

JUDGE'S CERTIFICATE

I hereby certify that the Court of Appeals of Kentucky considered all the points and questions raised in the petition for rehearing and all of the points and questions were passed upon by the entire Court at it's Winter Term, and on February 5, 1954, the full Court overruled appellants' motion for rehearing and modified the Court's opinion on its face.

Brad. M. Stewart, Chief Justice, Court of Appeals of Kentucky.

[fol. 496] [File endorsement omitted.]

FILED
JUL 2 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

NO. 186

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. of L., an Unincorporated Labor Union; PAUL W. PRIDDY, JOSEPH BURRELL, STOY DECKER, WILLARD MARPLES, JAMES MALLORY, ALMA HARPER, Individually, and as Representatives of a Class Consisting of Members of General Drivers, Warehousemen and Helpers, Local Union No. 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an Unincorporated Labor Union,

Petitioners,

v.

THE AMERICAN TOBACCO COMPANY, INC.,

Respondent.

Petition for Writ of Certiorari to the Court of Appeals of Kentucky

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

NO. ....

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. of L., an Unincorporated Labor Union; PAUL W. PRIDDY, JOSEPH BURRELL, STOY DECKER, WILLARD MARPLES, JAMES MALLORY, ALMA HARPER, Individually, and as Representatives of a Class Consisting of Members of General Drivers, Warehousemen and Helpers, Local Union No. 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an Unincorporated Labor Union,

Petitioners,

v.

THE AMERICAN TOBACCO COMPANY, INC.,

Respondent.

Petition for Writ of Certiorari to the Court of Appeals of Kentucky

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To the Honorable the Justices of the Supreme Court of the United States:

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals of Kentucky entered in the above entitled case on February 5, 1954.

Opinions Below

An opinion was entered by the Jefferson Circuit Court, Chancery Branch, on April 23, 1954, and is unreported. An opinion was entered by the Kentucky Court of Appeals on June 2, 1953, and was modified on a Petition for Rehearing in an order issued February 5, 1954, and is reported, as modified, at 264 S.W. 2d 250.

Jurisdiction

The judgment of the Court of Appeals of Kentucky was entered on June 2, 1953 (R. 155). A Petition for Rehearing was filed by petitioners on August 1, 1953 (R. 170). An opinion and order modifying the opinion of June 2, 1953, and overruling the Petition for Rehearing was entered on February 5, 1954 (R. 175).

On April 23, 1954, an order was signed and entered in the Supreme Court of the United States by Mr. Justice Stanley Reed, extending the time within which to file this Petition for Certiorari to and including July 3, 1954.

The jurisdiction of this Court rests upon 28 U.S.C. §1257 (3).

Questions Presented

1. Does a state court have jurisdiction or power "to compel by injunctive process" union members, engaged in driving common carrier motor vehicles in interstate commerce and covered by a collective bargaining agreement permitting them to respect picket lines, "to cross a picket line advertising a lawful strike" conducted against another employer by other members of that same union, on the sole ground that a refusal to cross such picket line interferes with a duty imposed by state law on common carriers to deliver to all customers without discrimination,[1]

(a) in view of those sections of the Labor-Management

[1] The quotations herein are from the statement of the question as framed by the Kentucky Court of Appeals below (R. 156).

Relations Act of 1947[2] protecting the right of employees to refuse to enter the premises of another employer whose employees are engaged in a lawful strike; or

(b) in view of those sections of the Interstate Commerce Act[3] making it unlawful for any common carrier motor vehicle to subject any person to any unjust discrimination, and giving the Interstate Commerce Commission exclusive and primary authority to determine whether any discrimination has been engaged in, and giving the federal district courts jurisdiction to enjoin such discriminatory activities upon application of the Interstate Commerce Commission?

2. Does a state court have jurisdiction or power to enjoin the use of or to declare illegal an agreement between a common carrier and a union representing its employees, under which such employees are permitted to respect picket lines without fear of discharge, under the circumstances and in view of the considerations set forth in Question 1 above?

Constitutional and Statutory Provisions Involved

The constitutional provision involved is found in the Constitution of the United States, Article VI, second sentence, as follows:

> "This Constitution, and Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding."

Pertinent statutory provisions which are printed in Appendix A, infra, pp. 18-23, are as follows: 29 U.S.C. §157, 61 Stat. 140; 29 U.S.C. §158(b)(4), 61 Stat. 140; 29

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[2] Section 7, the proviso to Section 8(b), Section 13, Section 501(2) and Section 502.

[3] 49 U.S.C.A. §316(d), 316(e) and 322(b).

U.S.C. §163, 61 Stat. 151; §501(2) and 502 of the Labor-Management Relations Act of 1947, 61 Stat. 161, 162; 49 U.S.C. §316(d), 49 Stat. 558, as amended, 54 Stat. 924; 49 U.S.C. §316(e), 49 Stat. 558, as amended, 54 Stat. 924; 49 U.S.C. §322(b), 49 Stat. 564; Kentucky Revised Statutes, §281.600, 281.610, 281.685.

Statement of the Case

Petitioners are a labor organization, General Drivers, Warehousemen and Helpers, Local Union No. 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, and certain individuals as representatives of a class consisting of members of the abovesaid union (R. 2-3).[4] Respondent American Tobacco Company is engaged in the business of manufacturing and selling cigarettes and other tobacco products (R. 2). It owns and operates a subsidiary in Louisville, Kentucky, known as American Suppliers, Inc. (R. 158). This subsidiary was found by the Jefferson Circuit Court, Chancery Branch, and by the Kentucky Court of Appeals to be so closely related to the respondent that respondent and it must be considered as one operation, one employer, and one distinct entity for the purpose of this action (R. 160). Petitioner Local Union 89 has as members employees of such subsidiary and also employees of various common carriers operating in and out of Louisville, which common carriers were engaged in making deliveries to respondent and such subsidiary (R. 117, 118), as well as to other customers. There was in existence a collective bargaining agreement between Local 89 and such common carriers containing a clause permitting Local 89's members to refuse to cross picket lines established at the premises of

[4] In addition to the certified record, there is a transcript of evidence, containing pp. A-384, taken at a hearing on April 14, 1953, which was certified by the clerk of the Court of Appeals. There are only two references herein to matters contained in the transcript of evidence, which is cited as follows: (Tr. . . .).

customers of such common carriers (R. 119).[5] Local 89 is the certified bargaining representative of the employees of the above mentioned subsidiary (Tr. 225). When the parties were unable to agree upon the terms of an agreement, a duly authorized strike was begun by the petitioning union at this subsidiary plant of respondent in March of 1953 (Tr. 239). Pursuant to the strike a picket line was established at the subsidiary's premises, at or adjacent to the premises where also was located a portion of respondent's operations (R. 4, 5).

As a consequence of this strike, respondent filed a petition in equity in the Jefferson Circuit Court, Chancery Branch on April 4, 1953, alleging that certain picketing activities on the part of petitioners were unlawful under state law and seeking an order restraining petitioners from engaging in such activities in connection with the labor dispute between the parties (R. 2). A temporary restraining order was issued on April 6, 1953 (R. 15-18) granting respondent's request for an order forbidding picketing and other conduct allegedly in violation of Kentucky law. The case was then set down for hearing on the application for permanent injunction on April 14, 1953, (R. 18) at which time evidence was taken on the issues. On April 22, 1954, the trial court entered a judgment (R. 138) granting a permanent injunction which modified the temporary in-

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[5] The clause in question read as follows:

"It shall not be considered a violation of this Agreement for employees covered hereunder to refuse to cross a picket line of a Union or refuse to handle unfair goods. The term unfair goods, as used in this section includes, but is not limited to, any goods or equipment transported, interchanged, handled, or used by any carrier, whether party to this Agreement or not, at whose terminal or terminals or place of business there is a controversy between such carrier or its employees on the one hand and a labor union on the other hand; and such goods or equipment shall continue to be 'unfair' while being transported, handled, or used by interchanging of succeeding carriers whether parties to this Agreement or not, until such controversy is settled."

junction previously issued in various respects.[6] The permanent injunction permitted picketing but enjoined petitioners from maintaining excessive numbers of pickets, from threatening injury to persons or property, from using abusive language, and

> "From causing, aiding or abetting any common carrier or contract carrier unreasonably to discriminate against plaintiff by refusing while remaining an employee thereof, or inducing, encouraging, coercing or otherwise causing or arranging with common or contract carriers or any persons connected therewith to refuse to accept, handle, transport, and deliver, in accordance with their legal and contract obligations, property shipped by or to plaintiff, so long as property is being handled, transported and delivered by or to other customers of such contract or common carriers." (The full order of the trial court is set out in Appendix C.)

The effect of the above quoted portion of the injunction order was to require such of Local 89's members as were employed by common carriers to cross picket lines established at the premises of any customer of any such common carriers engaged in a labor dispute and, in particular, to cross the valid picket line established at respondent's subsidiary's premises by Local 89.[7] No distinction was made

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[6] The complaint was drawn and the temporary injunction had been issued primarily on the theory that a "secondary boycott" was involved. Upon presentation of the evidence at the hearing on the permanent injunction, the trial court found that no secondary activity was involved, but then noted that petitioners' members had no right to interfere with common carriers attempting to make deliveries at respondent's or its subsidiary's place of business by respecting otherwise lawful picket lines established at such premises. On this point the trial court heard additional argument and issued a separate opinion respecting the "common carrier" issue, (R. 136).

[7] An example of the practical construction given a similar decree in this case is seen from the contempt proceedings instituted against certain of petitioner Local 89's members for respecting the picket line established at respondent's subsidiary's premises.

in the decree between common carriers subject to the Interstate Commerce Commission under the Interstate Commerce Act and carriers involved in purely intrastate operations, although it was argued before the Kentucky Court of Appeals on rehearing (R. 170) that the decree was invalid insofar as it involved employees employed by common carriers subject to the jurisdiction of the Interstate Commerce Commission. The record does disclose that various common carriers making deliveries to respondent subsidiary were engaged in interstate commerce, as for example, the common carriers employing the employees involved in the contempt proceedings mentioned in f.n.[7] (R. 34, 143).

Petitioners appealed only from the above quoted portion of the trial court's permanent injunction order to the Court of Appeals of Kentucky.[8] That Court upheld and affirmed the decree of the trial court both on original ap-

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The temporary restraining order above referred to contained a clause reading as follows:

> "From refusing or inducing, encouraging, coercing or otherwise causing or arranging with, the employees of other employees (sic), particularly common carriers, or with such employers, to refuse to accept, handle, transport and deliver in accordance with their legal and contract obligations, property shipped by or to plaintiff."

Certain of petitioner Local 89's members employed by a common carrier respected the picket line at such premises and were found guilty of contempt of court for violating such order (R. 34, 146). These contempt proceedings are not involved in the present case.

Another example of the construction given the above quoted portion of the final decree is seen under a rule to show cause why contempt should not lie for the action of certain members of Local 89 employed by the Middle West Freightways, Inc., a common carrier in refusing to pick up a shipment at respondent's for delivery to Kansas City, Missouri, the refusal being occasioned by the refusal to cross the picket line (R. 143). The rule was respited until May 18, 1953 (R. 145), and the Record does not reveal any further disposition of this matter.

[8] Respondent took a cross appeal on the question of secondary picketing, which appeal was dismissed by the Kentucky Court of Appeals (R. 155) and is not in issue here.

peal (June 2, 1953, R. 156) and on rehearing (February 5, 1954, R. 175). The Kentucky Court of Appeals, in its opinion, held that, under both common and statutory law in Kentucky, common carriers have an absolute duty to make deliveries without discrimination, which duty is interfered with when employees of such common carriers seek or attempt to respect otherwise lawful picket lines established at the premises of customers either by their own or other unions. This duty, the Court found, admitted of no exceptions because of Taft-Hartley, with which Act the Court found no conflict by virtue of the injunction requiring such of petitioners' members as were employed by common carriers to cross picket lines established at the premises of any customer of such common carriers. In this respect the Court stated as follows (R. 164, 5):

> "The appeal here involves the refusal of employees of carriers who happen to belong to Local 89, the bargaining representative of Suppliers' employees, to transport the merchandise of American through the picket line at 17th and Broadway Streets, and this disobedience is not complained of as an unfair labor practice but as a violation of the common law, the constitutional law and the statutory law of Kentucky. More than that, the illegal conduct of the employees could subject them to criminal prosecution. It follows that the portion of the injunction requiring performance of the duty to carry American's goods in no way impairs the right to strike, the right to picket or any other right guaranteed by the federal law or the Constitution of the United States."

In addition, the Court found that the agreement between petitioner Local 89 and various common carriers, permitting petitioners' members to respect picket lines, was invalid as an interference with the common law duty of the common carrier to make deliveries to all customers without discrimination (R. 165). The Court stated in this connection:

> "Finally, the employees of the carriers rely upon a

provision of the agreement between themselves and their employers covering the period from February 1, 1952, to January 31, 1955, to the effect that it shall not be a violation of their contract or a cause for discharge to refuse to go through the picket line of a union or to refuse to handle unfair goods. They insist that this stipulation excuses them from serving American. The legal duty of a common carrier to handle the merchandise of a shipper without discrimination existed long before the contract came into being, and, by like token, employees of common carriers, as long as they voluntarily remain in the hire of their employer, do not have the lawful right to withhold their services from a particular customer who deals with their employer. Where the common carrier and its employees seek by a contractural provision to avoid the responsibility imposed by statute, such a contractural provision is void. Such is the case here."

The Court disposed of the Petition for Rehearing simply by adopting its previous opinion with some minor modifications as more fully set forth in Appendix B. Thus the Court rejected, without opinion, the contention of petitioners, raised specifically on rehearing, that jurisdiction to define duties of interstate common carriers engaged in interstate commerce lies exclusively in the Interstate Commerce Commission under the Interstate Commerce Act. The Court did, however, consider, and pass upon by rejecting, this contention as well as all others made in the Petition for Rehearing (R. 187).

The federal questions sought to be reviewed were presented and disposed of below as follows:

(1) The question of whether, in view of Taft-Hartley, the Kentucky courts had jurisdiction or power to require members of the union who were employees of common carriers to make deliveries was raised on argument of counsel for petitioners, as shown in the record at R. 136-7, whereupon the Jefferson Circuit Court, Chancery Branch, filed a Memorandum Opinion on Terms of Injunction, with pertinent provisions as follows:

> "Plaintiff insists that the threatened action of the members of the Union who are so employed to refuse to make deliveries to it is violative of K.R.S. 281.685, wherein a common carrier (similar provisions are also had for contract carriers) is enjoined against subjecting any person to any unreasonable discrimination, and the penalty provisions of the same chapter, which in effect provide that any person who causes, aids or abets any violation of the above is doing an unlawful act." (R. 136.)

And continuing:

> "Counsel for the Union insists that to require the members of the Union to make these deliveries in spite of their contract agreement to the contrary would amount to involuntary servitude and also a violation of the Taft-Hartley Act.
>
> "On the authority of the above-mentioned provision of the Statute, and on the authority of these two cases considering similar statutes, Burlington Transport Co. v. Hathaway, 12 N.W. (2d) 167, an Iowa case, and Turner v. Zanes, 206 S.W. (2d) 144, a Texas case, the Court is of the opinion that appropriate language should be contained in the permanent injunction restraining any unlawful discrimination. /s/ Stuart E. Lampe, Judge." (R. 137.)

The question was next presented to the Court of Appeals on appeal in petitioner's brief and argument and so considered and decided adversely to petitioners by the said Court of Appeals both on the original appeal (R. 156) and upon rehearing (R. 176, et seq.).

(2) The question of whether or not state courts are without jurisdiction to enjoin employees of carriers from refusing to handle freight of a shipper involved in a labor dispute because of provisions of the Interstate Commerce Act (49 U.S.C. §316(d)(e), 322(b)) was not presented to the Jefferson Circuit Court, Chancery Branch, was not presented to the Kentucky Court of Appeals on the original appeal, but was presented in the Petition for Rehearing (R. 170), and was considered and denied by the Court of

Appeals as per the certificate of Acting Chief Justice Stewart (R. 187).

(3) The question of whether the state court had jurisdiction or power to declare invalid the provisions of the collective bargaining agreement between petitioner Local 89 and various common carriers permitting petitioners' members to respect picket lines was raised before the Jefferson Circuit Court, Chancery Branch, on argument by counsel for petitioners (defendants below) on the injunction order, with said question being decided adversely (R. 137). The question was then presented to the Court of Appeals on appeal in briefs and argument of counsel and was considered by the Court and decided adversely to the petitioner (R. 165).

Reasons for Granting of Writ

Important questions of conflict with and preemption by federal law are presented in this case. The Court of Appeals of Kentucky has decided these questions in a manner contrary to applicable decisions of this Court. The precise questions here involved have never been determined by this Court, but they are of sufficient substance to warrant such determination, dealing as they do with the paramountcy of federal law both in an important aspect of employee rights protected under the Labor-Management Relations Act of 1947 and in an important field of federal regulation of the operation of motor carriers under the Interstate Commerce Act (Title 49 U.S.C.A. §301, et seq.). As will be seen, the state court has undertaken to establish various duties, under state law, of both interstate motor vehicle common carriers and their employees, in spite of the fact that such duties insofar as they are applicable to such employees are in direct conflict with and in deprivation of rights guaranteed under the Management-Labor Relations Act of 1947, and in spite of the fact that jurisdiction to establish such common carrier duties in the first

instance is lodged exclusively, under the Interstate Commerce Act, in the Interstate Commerce Commission.

1. The state court has enjoined the exercise of rights guaranteed and protected under the Labor-Management Relations Act of 1947. Sections 7, 13 and, in particular, the proviso to Section 8(b) insure to employees embraced under the Act the right to respect legitimate picket lines established by fellow union members. This has been expressly so held by the National Labor Relations Board. *Cyril DeCordova & Bros.*, 91 NLRB 1121; *Rockaway News Supply Co.*, 94 NLRB 1056. Appeals in the *Rockaway News* case reached this Court in *NLRB v. Rockaway News Supply Co.*, 345 U. S. 71. While the majority decision therein refrained from expressly passing on the point,[9] the minority decision (p. 81) held that the right to refuse to cross a picket line was one protected by the Act. The minority noted that "habitual respect for union picket lines has long been the practice of union men. This practice has been a prize asset of the unions." The tradition of union men that they respect picket lines established by fellow union members—in this case members of the same local union—is one of the strongest and most deeply rooted in the labor movement. The tradition goes to the very heart of the principle of mutual aid and assistance so vital to the functioning and solidarity of any trade union movement worthy of the name. As pointed out in the *Rockaway* dissent of Justices Black, Douglas and Minton, and as rec-

[9] The majority decision held that regardless of any status that the right to refuse to cross picket lines might have under the Act, that right, like the right to strike, was subordinate to express commitments under an existing collective bargaining agreement so that, where such agreement contained a no-strike clause which required employees to continue their duties without work stoppages, the employer was justified in discharging the employee for refusing to cross a picket line. In the present case, the existing collective bargaining agreement contained a clause, as stated by the court below, "to the effect that it shall not be a violation of their contract or a cause for discharge to refuse to go through the picket line of a union." (R. 119.)

ognized by the Board in the above quoted cases, this tradition and the right of union members, individually or concertedly, to observe it is expressly recognized under the proviso of Section 8(b)[10] and under the general right given all employees under Section 7 of the Act "to assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." If this right, of vital importance to organized labor and protected under the federal law, can be enjoined in the state courts under a theory that interstate carriers have an absolute duty under state law to deliver goods to any and all customers regardless of whether any particular customer may be involved in a lawful strike, then an easy method for the avoidance of federal rights has been discovered. This Court, in *Hill v. Florida*, 325 U. S. 538, has made clear that in such cases of head-on conflict between rights protected under the federal law and duties prescribed by the state, the federal law must prevail. See also *Allen-Bradley v. NLRB*, 315 U. S. 740; *NLRB v. Kalamazoo Stationery Co.* 160 F. 2d 465; certiorari denied 332 U. S. 762.

It is to be noted that the right to respect picket lines is, under the state law, flatly and in all circumstances denied, that is, without relation to any unlawful object such as might have been the case had the right been exercised in connection with an unlawfully established picket line or in aid of an unlawful strike. This being so, the argument that the common carrier "duty" established under state law is akin to the various duties imposed by the states upon public utilities is unavailing. In *Amalgamated Association v. Wisconsin Board*, 340 U. S. 383, this Court held that a

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[10] "Sec. 8(b) . . . *Provided*, That nothing contained in this Subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than for his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act."

general proscription on the right of employees of public utilities to strike under any and all circumstances was in conflict with the paramount federal law establishing such right generally. "Creation of a special classification for public utilities is for Congress, not for this Court";[11] and this is equally true if the utility be a common carrier.

2. In any event and regardless of any question of the paramountcy of federal law protecting the right of employees to respect picket lines, it would appear clear that the state court was lacking in jurisdiction and power to attempt to adjudicate, in respect to motor carriers subject to the Interstate Commerce Act, the question of whether there exists some species of duty by state law under which such carriers are bound to make deliveries to any and all customers regardless of any strike circumstances that might be involved. The Interstate Commerce Act makes it unlawful for common carriers by motor vehicle, engaged in interstate commerce, to subject any customer to unjust or unreasonable discrimination (49 U.S.C. 316(d)). It further provides (Sec. 316(e)) that the Interstate Commerce Commission shall, upon complaint of an unjust discrimination, make an investigation and a determination as to whether there is in fact any unjust, unreasonable, or discriminatory practices engaged in. Section 322(b) then provides for enforcement of orders or regulations of the Commission in this respect by injunctive process in the district courts of the United States upon application of the Commission. A long line of cases[12] has established the principle that the Interstate Commerce Act represents a

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[11] *Amalgamated Association v. Wisconsin Board, supra,* at 392.

[12] *Armour & Co. v. Alton R.R. Co.*, 312 U. S. 195; *Mitchell Coal & Coke Co. v. Pennsylvania R.R. Co.*, 230 U. S. 247; *B. & O. Railroad Co. v. U. S., ex rel Pilcum Coal Co.*, 215 U. S. 481; *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, *St. Louis, Brownsville & Mexico Ry. Co. v. Brownsville Navigation Dist.*, 304 U. S. 295; *T. & P. Railway v. American Tie & Timber Co.*, 234 U. S. 138; *Great Northern Ry. Co. v. Merchant's Elevator Co.*, 259 U. S. 285; *Terminal Warehouse Co. v. Pennsylvania Railway Company*, 297 U. S. 500.

comprehensive effort on the part of the federal government to control in all ways and manners the transportation of goods in interstate commerce, to define the duties and obligations of motor carriers engaged in such transportation, and to set up procedures for investigation and determination of alleged violations of their obligations and duties as common carriers. The Act was designed to achieve uniformity in the transportation system and to prevent imposition of conflicting duties and obligations by local regulation. By so doing, Congress has pre-empted the field (other than safety of highways) and has made either state courts or state administrative bodies powerless to act in such field. In *Loomis v. Lehigh Valley R.R. Co.*, 240 U. S. 43, and *Great Northern v. Merchants Elevator Co.*, 259 U. S. 285, this Court made clear that resort to the Interstate Commerce Commission for determination of the administrative question of the discriminatory or unreasonable nature of a carrier's failure or refusal to provide service was an absolute condition precedent to any action being taken in respect to any such alleged discriminatory practices by any other tribunal. See also *Terminal Warehouse Co. v. Pennsylvania R.R. Co.*, 297 U. S. 500.[13] The Congress having taken in hand the particular subject matter of the question of the reasonableness of an interstate motor carrier to refuse or fail to make deliveries into a strike-bound plant, state laws respecting that same subject matter must fall. *Charleston & Carolina R.R. v. Varnville Co.*, 237 U. S. 597; *Missouri Pacific R. Co. v. Porter*, 273 U. S. 341.

The question of the effect on employees' rights to engage in activities protected under the federal law of alleged

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[13] Incidentally, the federal rule is that refusal to deliver because of the existence of a labor dispute is sufficient reason to make the carrier's refusal or failure to deliver a reasonable and non-discriminatory one. See "The Plight of a Strike-Bound Carrier," Charles H. Woods, Minnesota Law Review, February, 1949, pp. 255-282; *Montgomery Ward & Co. v. Chicago M. S. P. & P. Railway*, 268 I.C.C. 257; *Consolidated Freightways*, 42 M.C.C. 225.

duties imposed upon either rail or motor vehicle common carriers by virtue of state statute or common law has been the subject of considerable litigation in the lower courts in the last several years. See e.g. *Montgomery Ward & Co. v. The Northern Pacific Terminal Co. of Oregon, et al.*, 23 C.C.H. Labor Cases ¶67,713; *S. E. Overton Company v. International Brotherhood of Teamsters, etc.*, 115 F. Supp. 764. There has been an increasing attempt on the part of certain groups of employers to invoke such state laws as a means of enjoining heretofore lawful and peaceful labor activities. A determination of the effect of such state laws and of the jurisdiction of the state courts to resolve conflicting rights in this field has become of transcending importance in the field of labor relations. All these issues are presented under the facts and determinations in this case. A resolution of such issues is of vital importance to the proper conduct of union activities and to the proper administration of both the Labor-Management Relations Act of 1947 and the Interstate Commerce Act.

3. A final important question of federal law determined by the court below and in conflict with applicable decisions of this Court is involved in its holding, incidental to its determinations discussed in Points 1 and 2 above, that an agreement duly entered into between various of common carriers and the local union herein, under which such members were accorded the right to respect picket lines without fear of discharge or other retaliation, was invalid and unenforceable. This Court, in the *Rockaway News* case, *supra*, and the Second Circuit in *Rabouin v. NLRB*, 195 F. 2d 906, has specifically upheld the validity of such agreements under the Labor-Management Relations Act of 1947. In *Rockaway* this Court stated in this respect that the proviso to Section 8(b) above referred to "clearly enables the contracting parties to embody in their contract a provision against requiring an employee to cross a picket line if they so agree." Accordingly, the legal considerations applicable in Points 1 and 2 above are relevant here, and

it would appear that the Court of Appeals of Kentucky is clearly in error in holding that the state law respecting the alleged duties of common carriers to maintain deliveries in spite of strike difficulties of particular customers supersedes the rights of union and employers subject to the federal labor act to enter into the agreements in question. Such clauses are an important subject matter of collective bargaining and are found in numerous agreements of various labor organizations throughout the country. It cannot be assumed, absent express indication of Congressional intent (see e.g. Section 14(b)), that Congress left to the states jurisdiction to legislate concerning that particular aspect of collective bargaining.

In any event, jurisdiction to determine the legality of such agreements would appear to be solely within the province of the National Labor Relations Board or of the federal courts seeking, upon application of the Board, to enjoin practices alleged to be in violation of Section 8(b)(4). See *Rabouin, d.b.a. Conway's Express*, 87 NLRB 972; *Pittsburgh Plate Glass Co.*, 105 NLRB No. 120; *Garner, et al. v. Teamsters Local Union 776*, 346 U. S. 485; *Building Trades Council, et al. v. Kinard Construction Co.*, 346 U. S. 933.

CONCLUSION

For the foregoing reasons it is respectfully requested that this Petition for Writ of Certiorari be granted.

Dated: July 3, 1954.

Respectfully submitted,

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APPENDIX A

29 U.S.C. Sec. 157. *Right of employees as to organization, collective bargaining, etc.*

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 158(a) (3) of this title. As amended June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, Sec. 101, 61 Stat. 140."

29 U.S.C. Sec. 158(b)(4). *Unfair labor practices.*

"To engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 159 of this title; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of Section 159 of this title; (D) forcing or requiring any employer to assign particular work to

employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work. . . ."

". . . *Provided*, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter;"

29 U.S.C. Sec. 163. *Right to strike preserved.*

"Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations of qualifications on that right. As amended June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, Sec. 101, 61 Stat. 151."

LABOR-MANAGEMENT RELATIONS ACT OF 1947, 61 Stat. 161, 162.

"Sec. 501(2). The term 'strike' includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees."

"Sec. 502. Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of

employment of such employee or employees be deemed a strike under this Act."

49 U.S.C. §316(d). *Undue preferences or prejudices prohibited.*

"All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

49 U.S.C. §316(e). *Complaints to and investigation by commission; power of commission to fix reasonable rates, regulations, etc.*

"Any person, State board, organization, or body politic may make complaint in writing to the Commission that any such rate, fare, charge, classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this section or of Section 317 of this title. Whenever, after hearing, upon complaint or in an investigation on its own initiative, the Commission shall be of the opinion that any individual or joint rate, fare, or charge, demanded, charged, or collected by any common carrier or carriers by motor vehicle or by any common carrier

or carriers by motor vehicle in conjunction with any common carrier or carriers by railroad and/or express, and/or water for transportation in interstate or foreign commerce, or any classification, rule, regulation, or practice whatsoever of such carrier or carriers, affecting such rate, fare, or charge or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial, it shall determine and prescribe the lawful rate, fare or charge or the maximum or minimum, or maximum and minimum rate, fare, or charge thereafter to be observed, or the lawful classification, rule regulation, or practice thereafter to be made effective and the Commission shall, whenever deemed by it to be necessary or desirable in the public interest, after hearing, upon complaint or upon its own initiative without a complaint, establish through routes and joint rates, fares, charges, regulations, or practices, applicable to the transportation of passengers by common carriers by motor vehicle, or the maxima or minima, or maxima and minima, to be charged, and the terms and conditions under which such through routes shall be operated: *Provided, however,* That nothing in this chapter shall empower the Commission to prescribe, or in any manner regulate, the rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose whatever."

49 U.S.C. §322(b). *Jurisdiction of district courts to restrain violations and enforce orders.*

If any motor carrier or broker operates in violation of any provision of this chapter (except as to the reasonableness of rates, fares, or charges and the discriminatory character thereof), or any rule, regulation, requirement, or order thereunder, or of any term or condition of any certificate or permit, the Commission or its duly authorized agent may apply to the district court of the United States for any district where such motor carrier or broker operates, for the enforcement of such provision of this chapter, or of such rule, regulation, requirement, order, term, or condition; and such

court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such carrier or broker, his or its officers, agents, employees, and representatives from further violation of such provision of this chapter or of such rule, regulation, requirement, order, term, or condition and enjoining upon it or them obedience thereto.

Kentucky Revised Statutes, Section 281.600. *Administrative Functions and Powers of the Department.*

"The Department of Motor Transportation shall exercise all administrative functions of the state in relations to motor transportation as defined in this chapter, and shall apply, as far as practical, the administrative and judicial interpretations of the Federal Motor Carrier Act. It shall have the right to regulate motor carriers as provided in this chapter, and to that end may establish reasonable requirements with respect to continuous and adequate service of transportation, systems of accounts, records and reports, preservation of records and safety of operation and equipment. It may issue subpoenas, subpoenas duces tecum, and orders of personal attendance for the attendance of witnesses, any proceeding before it, and permit the and protection of pertinent records, for taking of depositions, or in accord with the Civil Code of Practice, and it shall have the power to make such rules and regulations as it may deem necessary to carry out the provisions of this chapter."

Kentucky Revised Statutes, Section 281.610. *Regulation of Interstate Commerce.*

"(1) The provisions of this chapter shall apply to interstate commerce, except insofar as such application is in conflict with any provision of the Constitution of the United States or the Acts of Congress.

"(2) The Commissioner may grant a certificate of convenience and necessity for the transportation of persons or property for compensation in interstate commerce, and may regulate such interstate commerce under the authority of and in accordance with the provisions of any Act of Congress vesting in or dele-

gating to the Commissioner such authority as an agency of the United States Government. The Commissioner may notify the proper department of the Federal Government of his assent to the requirements and conditions of such Act of Congress in regard to interstate commerce by motor vehicle."

Kentucky Revised Statutes, Section 281.685. *Adherence to Rates, Fares, Charges and Schedules; Discrimination.*

"(1) No common carrier shall charge, demand, collect or receive a greater, less or different compensation for the transportation of persons and property or for any services, in connection therewith, than the rates, fares and charges specified in its tariffs and classifications filed with the Department and in effect at the time; nor shall any common carrier refund or remit any part of the rates, fares or charges so specified, or make or give any unreasonable preference or advantage to any person, or subject any person to any unreasonable discrimination.

(2) No contract carrier shall charge, demand, collect or receive a greater, less or different compensation for the transportation of persons or property or for any services in connection therewith then that contained in the contract required to be filed with the Department and in effect at the time; nor shall any contract carrier refund or remit any part of the charges specified in the contract, or make or give any unreasonable preference or advantage to any person, or subject any person to any unreasonable discrimination."

APPENDIX B

Said Memorandum Opinion on Terms of Injunction filed in Court April 23, 1953, is as follows, to-wit:

JEFFERSON CIRCUIT COURT
CHANCERY BRANCH
SECOND DIVISION

THE AMERICAN TOBACCO COMPANY, INC., *Plaintiff.*

vs.

Memorandum Opinion on Terms of Injunction

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. OF L., is the authorized representative for the purpose of collective bargaining of employees of American Suppliers, Inc., *Defendants.*

The Court having authorized picketing of American Tobacco Company as well as American Suppliers, Inc., the plaintiff insisted that the temporary injunction heretofore issued requiring members of defendant union, who were also employees of common or contract carriers, to continue to make deliveries to the plaintiff without discrimination.

Plaintiff insists that the threatened action of the members of the union who are so employed to refuse to make deliveries to it is violative of K.R.S. 281.685 wherein a common carrier (similar provisions are also had for contract carriers) is enjoined against subjecting any unreasonable discrimination, and the penalty provisions of the same chapter, which in effect provide that any person who causes, aids or abetts any violation of the above is doing an unlawful act.

Counsel for the union insists that to require the members of the union to make these deliveries in spite of their contract agreement to the contrary would amount to in-

voluntary servitude and also a violation of the Taft-Hartley Act.

On the authority of the above mentioned provisions of the statute, and on the authority of these two cases considering similar statutes, *Burlington Transport Co. v. Hathaway,* 12 N.W. (2d) 167, an Iowa case, and *Turner v. Zanes,* 206 S. W. (2d) 144, a Texas case, the Court is of the opinion that appropriate language should be contained in the permanent injunction restraining any unlawful discrimination.

/s/ STUART E. LAMPE,
Judge.

COURT OF APPEALS OF KENTUCKY

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION 89, ET AL., *Appellants,*

vs.

THE AMERICAN TOBACCO COMPANY, INC., *Appellees.*

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division, Honorable Stuart Lampe, Judge.

OPINION OF THE COURT BY JUDGE STEWART—AFFIRMING ON THE APPEAL AND ON THE CROSS-APPEAL

Two questions are presented for determination on this appeal and cross-appeal:

1. Are the pickets around the property of the American Tobacco Company, herein referred to as "American," at 17th and Broadway Streets in Louisville, involved in primary or secondary picketing, since the strike is conducted at the same address against American Suppliers, Incorporated, herein called "Suppliers"?

2. May a driver of a common or contract carrier be compelled against his wishes by injunctive process to cross a picket line advertising a lawful strike, when the driver is a member of the same union that is conducting the strike but he is not on strike himself?

We have chosen to consider the cross-appeal, or question No. 1, first.

On March 30, 1952, Local Union No. 89 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America of the American Federation of Labor, hereinafter referred to as "Local 89" for the sake of brevity, called a strike against Suppliers and threw picket lines around four of its establishments, viz.: A redrying plant at 9th and Magnolia Streets; an office with a small warehouse attached at 908 South 8th Street; a group of warehouses at 7th Street and Arcade Avenue; and

a "stemmery" situated upon American's property at 17th and Broadway Streets. Suppliers is a subsidiary of American, but it is not a party to this appeal.

It is the picketing on all sides at the last mentioned location that is the bone of contention. The stemmery is situated on ground owned by American and is completely surrounded by American's cigarette factory, its auxiliary structures and its fences. American maintains that its main gates are on Broadway and that they are not and have never been used for ingress and egress of either personnel or materials of Suppliers except to some small extent. On the other hand it states that access can be had to Suppliers for all purposes from 17th Street. It is therefore perfectly practical, American argues, to set aside the entire side on Broadway for its exclusive use and thereby prevent it from becoming entangled in the labor dispute that exists only between Local 89 and Suppliers. Furthermore, American asserts it is engulfed in this controversy solely because of its corporate and geographical relations with Suppliers, but that there is not now and there has never been any affiliation between its employees and Local 89, so that it is being subjected to a secondary boycott by the conduct of the union, and that the sphere of picketing can and should be restricted to the disputants in such a manner as to relieve it from damaging results that flow therefrom. Local 89 takes the position that the picketing is primary, proper and legal. The Chancellor adopted the view of Local 89, and American has cross-appealed from the judgment in this respect. Accordingly, we must search the record to resolve whether this finding has a reasonable basis in the evidence.

We have mentioned the physical layout of the stemmery. Aside from this, American and Suppliers have an economic inter-dependence; or, it might be said that Suppliers is the child of American, its parent, because the latter owns all the capital stock in the former. Suppliers buys raw tobacco and puts it through a certain process at the stemmery. The

tobacco is then transported from the stemmery to American's cigarette factory by means of a conveyor belt which runs from one to the other. Suppliers sells all its tobacco to American. It was brought out that American owns not only the land but the improvements employed by Suppliers in the operation of the stemmery. There was testimony that Suppliers leased the ground and the plant and paid rent to American for the use of the same; however, the terms of the lease and the amount of the rent were unknown to the local officials of either corporation. A central power plant on the property supplies steam to the facilities of both corporations, Suppliers paying for this service. The trucks of Suppliers carry advertisements of "Lucky Strike," a well-known manufactured product of American. Over the entrance of another plant of Suppliers at 7th and Arcade Streets, which is not immediately connected with this litigation, the name on the sign reads: "American Tobacco Company." At times employees of Suppliers work for American and the latter pays the former for such services. Employees of Suppliers also receive four packages of American made cigarettes as a part of their weekly compensation. If an employee of Suppliers is badly injured or becomes seriously ill, that person is sent to American's hospital for treatment. To sum up, Suppliers and American operate as a unit, except that each is a corporate entity and each is under separate management locally.

In the light of the foregoing factual background, we are confronted with this question: Is American a neutral in the existent dispute between Suppliers and Local 89? The test to be applied in arriving at a proper conclusion on this point may be thus stated: "An important factor in determining whether the activities of a union against an employer other than the one with which the union has a labor dispute come within the purview of the secondary boycott provision is the relationship between the two employers. If the relationship is so close that one may be regarded as the 'ally' of the other, picketing of one may be permissible

during a labor dispute with the other." See 16 A. L. R., 2d, paragraph 6, page 6. However, we are not without precedent on this subject in this jurisditcion.

In the recent case of *Local 181, etc. v. Broadway and Fourth Avenue Realty Company, Ky.*, 248 S.W. 2d 713, a strike involved a corporation which owned and operated the Brown Hotel and the Kentucky Hotel and another corporation which owned and operated the Martin Brown Building, all located in Louisville. Both corporations were, except for qualifying shares, entirely owned by Mr. Graham Brown. In this opinion, in passing on a contempt proceeding, we not only treated the whole controversy as a single labor dispute but we considered Mr. Graham Brown and the two corporations as in reality one and the same. There we said:

> "Supporting the conclusion that this is in the broad sense one labor dispute, is the fact that when the strike first commenced, picketing was begun at the Martin Brown Building, as well as the two hotels, although at that time there was no claim of a labor dispute affecting the employees of the Martin Brown Building.
>
> "In the eyes of the public, this has been a strike against Mr. Graham Brown, and the acts of violence have been committed by persons having a labor dispute with Mr. Brown."

We think the industrial alliance between Suppliers and American is so close that both may be considered as one operation. From the standpoint of physical setup the two are so enmeshed that they cannot be split apart without doing violence to both. To suggest that American has no interest in the dispute between Suppliers and Local 89 is to look at the form and remain blind to the substance. Nor can the naked claim of corporate separability be raised as a bar to picketing the primary employer at 17th and Broadway Streets. To remove the pickets from any side of this property would be to remove them from Suppliers at that location. It cannot, therefore, be said that American is a

neutral under the circumstances and that the picketing amounts to a secondary boycott at the above address. We conclude that the Chancellor correctly disposed of this issue.

Local 89 seeks by its appeal to nullify so much of the injunction as requires a driver of a common or contract carrier to cross against his will a picket line where a strike is in progress. It so happens in this instance that the carrier employees are members of the same union as those conducting the strike against Suppliers. It should be emphasized, however, that they refuse to handle freight for American while remaining in the service of their employer.

The rule of law that common carriers and their *employees* must serve all members of the public without discrimination is firmly established in Kentucky and, so far as we can find, *in all the states.* Its origin goes far back into the common law. Section 196 of the Constitution of Kentucky embodies the principle in this language: "Transportation of freight and passengers by railroad, steamboat or other common carrier, shall be so regulated, by general law, as to prevent unjust discrimination. No common carrier shall be permitted to contract for relief from its common law liability." Subsections 1 and 2 of KRS 281.685 read in part that no common or contract carrier shall "subject any person to any unreasonable discrimination." KRS 281.990 (1) stipulates that any person who "violates, or causes, aids or abets any violation of, any of the provisions of this chapter," which includes KRS 281.685 (1) and (2), "shall be fined not less than fifteen dollars nor more than two hundred dollars, or imprisoned for not more than thirty days or both."

The foregoing doctrine is set forth at length in 9 Am. Jur., Carriers, section 286, pages 607-608, and in 13 C. J. S., Carriers, section 27, pages 61-62.

In *Burlington Transp. Co. v. Hathaway (Iowa, 1943),* 12 N. W. 2d 167, a suit was brought by certain common carriers as plaintiffs against the teamsters, chauffeurs,

warehousemen and helpers union and its business agents as defendants to enjoin the latter from requiring employees of the union to refuse to handle the goods of John Blaul's Sons Company, a wholesale grocery company in Burlington, Iowa, which the union was attempting to organize. A picket line had been thrown around the grocery company and the employees of the union refused to transport freight for the grocery company. The Iowa statute as to nondiscrimination by carriers is similar to Kentucky's. The substance of the court's decision is as follows:

> "When the plaintiffs obtained their permits to operate as common carriers, they undertook the duty to transport the freight which the public tendered to them for transportation. The failure to carry out this duty to transport would not be excused by showing that its employees refused to obey the employers' order. See Chicago B. & Q. R. Co. v. Burlington, C. R. & N. Ry. Co., et. al., C. C., 34 F. 481, and Consolidated Freight Lines, Inc., et al., v. Department of Public Service, et al., 200 Wash. 659, 94 P. 2d 484, 485. In the last cited case a strike of laundry workers at the Davenport Hotel in Spokane resulted in a picket line around that hotel. Certain common carrier truck lines, who had been serving the hotel in the capacity of picking up freight or baggage and delivering it anywhere in the State of Washington or in the channels of interstate commerce, refused to send their trucks through the picket line at the hotel because the local manager of the teamsters' union threatened to call a strike of the carriers' drivers if they were permitted to go through the picket line. The hotel filed a complaint with the Department of Public Service against the carriers for the cancellation of their permits as common carriers. This resulted in an order suspending temporarily the permits under which the carriers operated. Upon appeal the action of the Commission was affirmed, the Supreme Court of Washington stating: 'The question then arises whether the appellants were excused by reason of the law. They being common carriers, it was their duty, under the facts and circumstances of this case, to send their trucks through the

picket line. 13 C. J. S., Carriers, p. 407, sec. 202; Moore on Carriers, 2d Ed., Vol. 1, p. 124; Chicago, B. & Q. R. Co. v. Burlington, C. R. & N. Ry. Co., C. C., 34 F. 481; Burgess Bros. Co. v. Stewart, 112 Misc. 347, 184 N. Y. S. 199.'

• • • • • • • •

"From the above it is clear that if the plaintiffs were to do that which the union sought to compel them to do, namely, not handle the Blaul merchandise, they would be doing an act prohibited by the common law and the statutory law of this state and an act that could subject them to criminal prosecution.

• • • • • • • •

"There was no labor dispute between plaintiffs and their employees or between plaintiffs and the defendant union. The union cannot concertedly exert, in aid of their labor dispute with Blaul, any economic pressure to compel these plaintiffs to do that which the law and public policy forbid. The injunction was rightly issued."

These cases support the rule laid down in the Hathaway case: *Pacific Gamble Robinson Co. v. Minneapolis & St. Louis R. Co., (D. C. Minn., 1952)* 105 F. Supp. 794; *Northwestern Pacific R. Co. v. Lumber & Sawmill Workers Union, etc., (Cal., 1948)* 189 Pac. 2d 277; *Turner v. Zanes, (Tex., 1947)* 206 S. W. 2d 144.

Counsel for Local 89 admit that the Hathaway case correctly sets forth the law on the issue raised by the appeal as of the date it was decided, namely, in 1943, but they insist that the Labor-Management Relations Act of 1947, commonly called the Taft-Hartley Act, 61 Stat. 136 (1947), 29 U. S. C. A., Sec. 151 et seq. (Supp. 1952), makes the question under discussion one exclusively controlled by the above enactment. To fortify this position, reliance is had upon this part of 29 U. S. C. A., Sec. 158, also known as 8 (b) (4) (D), which is as follows: "• • • provided, that nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer) if

the employees of such employer are engaged in a strike ratified or approved by representative of such employees whom such employer is required to recognize under this sub-chapter."

We do not agree with this line of reasoning. Section 8 (b) (4) (A), (B), (C) and (D) of the Labor-Management Relations Act of 1947 was clearly intended to outlaw only a secondary boycott, and such is not involved in the issue under consideration. See Picketing-Free Speech, Tanenhaus, Cornell Law Quarterly, Fall, 1952, Vol. 38, No. 1, pages 1 to 50; and see also the statement of Senator Taft in 93 Cong. Rec., page 4198. Nor does the above quoted provision purport to make lawful any act which aside from the statute in question is unlawful. The appeal here involves the refusal of employees of carriers who happen to belong to Local 89, the bargaining representatives of Suppliers' employees to transport the merchandise of American through the picket line at 17th and Broadway Streets, and this disobedience is not complained of as an unfair labor practice but as a violation of the common law, the constitutional law and the statutory law of Kentucky. More than that, the illegal conduct of the employees could subject them to criminal prosecution. It follows that the portion of the injunction requiring performance of the duty to carry American's goods in no way impairs the right to strike, the right to picket or any other right guaranteed by the federal law or the Constitution of the United States.

Finally, the employees of the carriers rely upon a provision of the agreement between themselves and their employers covering the period from February 1, 1952, to January 31, 1955, to the effect that it shall not be a violation of their contract or a cause for discharge to refuse to go through the picket line of a union or to refuse to handle unfair goods. They insist that this stipulation excuses them from serving American. The legal duty of a common carrier to handle the merchandise of a shipper without

discrimination existed long before the contract came into being, and, by like token, employees of common carriers, as long as they voluntarily remain in the hire of their employer, do not have the lawful right to withhold their services from a particular customer who deals with their employer. Where the common carrier and its employees seek by a contractural provision to avoid the responsibility imposed by statute, such a contractual provision is void. Such is the case here.

The question of whether a contempt has been committed is left for the Chancellor's determination. Our reason for this ruling is that the contempt, if any, is continuous in its nature and it should not be handled piecemeal. Besides, the Chancellor is on the ground, is familiar with the background of this suit and is in a better position to hear the evidence; therefore, this phase of the case can be more expeditiously handled for all concerned in the lower court.

It appears to us that an emergency exists in this case and a mandate shall issue forthwith without prejudice to the right to file a petition for a rehearing.

The judgment is affirmed on the appeal and on the cross-appeal.

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As modified on its face on rehearing February 5, 1954, as reported at 264 S. W. 2d 250.

COURT OF APPEALS OF KENTUCKY

June 2, 1953

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION 89, ET AL., *Appellants.*

vs.

THE AMERICAN TOBACCO COMPANY, INC., *Appellees.*

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OPINION OF THE COURT BY JUDGE STEWART—AFFIRMING ON THE APPEAL AND ON THE CROSS-APPEAL

Two questions are presented for determination on this appeal and cross-appeal:

1. Are the pickets around the property of the American Tobacco Company, herein referred to as "American," at 17th and Broadway Streets in Louisville, involved in primary or secondary picketing, since the strike is conducted at the same address against American Suppliers, Incorporated, herein called "Suppliers"?

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of brevity, called a strike against Suppliers and threw picket lines around four of its establishments, viz.: A redrying plant at 9th and Magnolia Streets; an office with a small warehouse attached at 908 South 8th Street; a group of warehouses at 7th Street and Arcade Avenue; and a "stemmery" situated upon American's property at 17th and Broadway Streets. Suppliers is a subsidiary of American, but it is not a party to this appeal.

It is the picketing on all sides at the last mentioned location that is the bone of contention. The stemmery is situated on ground owned by American and is completely surrounded by American's cigarette factory, its auxiliary structures and its fences. American maintains that its main gates are on Broadway and that they are not and have never been used for ingress and egress of either personnel or materials of Suppliers except to some small extent. On the other hand it states that access can be had to Suppliers for all purposes from 17th Street. It is therefore perfectly practical, American argues, to set aside the entire side on Broadway for its exclusive use and thereby prevent it from becoming entangled in the labor dispute that exists only between Local 89 and Suppliers. Furthermore, American asserts it is engulfed in this controversy solely because of its corporate and geographical relations with Suppliers, but that there is not now and there has never been any affiliation between its employees and Local 89, so that it is being subjected to a secondary boycott by the conduct of the union, and that the sphere of picketing can and should be restricted to the disputants in such a manner as to relieve it from damaging results that flow therefrom. Local 89 takes the position that the picketing is primary, proper and legal. The Chancellor adopted the view of Local 89, and American has cross-appealed from the judgment in this respect. Accordingly, we must search the record to resolve whether this finding has a reasonable basis in the evidence.

We have mentioned the physical layout of the stemmery.

Aside from this, American and Suppliers have an economic interdependence; or, it might be said that Suppliers is the child of American, its parent, because the latter owns all the capital stock in the former. Suppliers buy raw tobacco and puts it through a certain process at the stemmery. The tobacco is then transported from the stemmery to American's cigarette factory by means of a conveyor belt which runs from one to the other. Suppliers sells all its tobacco to American. It was brought out that American owns not only the land but the improvements employed by Suppliers in the operation of the stemmery. There was testimony that Suppliers leased the ground and the plant and paid rent to American for the use of the same; however, the terms of the lease and the amount of the rent were unknown to the local officials of either corporation. A central power plant on the property supplies steam to the facilities of both corporations, Suppliers paying for this service. The trucks of Suppliers carry advertisements of "Lucky Strike," a well-known manufactured product of American. Over the entrance of another plant of Suppliers at 7th and Arcade Streets, which is not immediately connected with this litigation, the name on the sign reads: "American Tobacco Company." At times employees of Suppliers work for American and the latter pays the former for such services. Employees of Suppliers also receive four packages of American made cigarettes as a part of their weekly compensation. If an employee of Suppliers is badly injured or becomes seriously ill, that person is sent to American's hospital for treatment. To sum up, Suppliers and American operate as a unit, except that each is a corporate entity and each is under separate management locally.

In the light of the foregoing factual background, we are confronted with this question: Is American a neutral in the existant dispute between Suppliers and Local 89? The test to be applied in arriving at a proper conclusion on this point may be thus stated: "An important factor in determining whether the activities of a union against an em-

ployer other than the one with which the union has a labor dispute come within the purview of the secondary boycott provision is the relationship between the two employers. If the relationship is so close that one may be regarded as the 'ally' of the other, picketing of one may be permissible during a labor dispute with the other." See 16 A. L. R., 2d, paragraph 6, page 6. However, we are not without precedent on this subject in this jurisdiction.

In the recent case of *Local 181, etc. v. Broadway and Fourth Avenue Realty Company, Ky.*, 248 S.W. 2d 713, a strike involved a corporation which owned and operated the Brown Hotel and the Kentucky Hotel and another corporation which owned and operated the Martin Brown Building, all located in Louisville. Both corporations were, except for qualifying shares, entirely owned by Mr. Graham Brown. In this opinion, in passing on a contempt proceeding, we not only treated the whole controversy as a single labor dispute but we considered Mr. Graham Brown and the two corporations as in reality one and the same. There we said:

> "Supporting the conclusion that this is in the broad sense one labor dispute, is the fact that when the strike first commenced, picketing was begun at the Martin Brown Building, as well as the two hotels, although at that time there was no claim of a labor dispute affecting the employees of the Martin Brown Building.
>
> "In the eyes of the public, this has been a strike against Mr. Graham Brown, and the acts of violence have been committed by persons having a labor dispute with Mr. Brown."

We think the industrial alliance between Suppliers and American is so close that both may be considered as one operation. From the standpoint of physical setup the two are so enmeshed that they cannot be split apart without doing violence to both. To suggest that American has no interest in the dispute between Suppliers and Local 89 is to look at the form and remain blind to the substance. Nor

can the naked claim of corporate separability be raised as a bar to picketing the primary employer at 17th and Broadway Streets. To remove the pickets from any side of this property would be to remove them from Suppliers at that location. It cannot, therefore, be said that American is a neutral under the circumstances and that the picketing amounts to a secondary boycott at the above address. We conclude that the Chancellor correctly disposed of this issue.

Local 89 seeks by its appeal to nullify so much of the injunction as requires a driver of a common or contract carrier to cross against his will a picket line where a strike is in progress. It so happens in this instance that the carrier employees are members of the same union as those conducting the strike against Suppliers. It should be emphasized, however, that they refuse to handle freight for American while remaining in the service of their employer.

The rule of law that common carriers and their employees must serve all members of the public without discrimination is firmly established in Kentucky and, so far as we can find, in all the states. Its origin goes far back into the common law. Section 196 of the Constitution of Kentucky embodies the principle in this language: "Transportation of freight and passengers by railroad, steamboat or other common carrier, shall be so regulated, by general law, as to prevent unjust discrimination. No common carrier shall be permitted to contract for relief from its common law liability." Subsections 1 and 2 of KRS 281.685 read in part that no common or contract carrier shall "subject any person to any unreasonable discrimination." KRS 281.990(1) stipulates that any person who "violates, or causes, aids or abets any violation of, any of the provisions of this chapter," which includes KRS 281.685 (1) and (2), "shall be fined not less than fifteen dollars nor more than two hundred dollars, or imprisoned for not more than thirty days or both."

The foregoing doctrine is set forth at length in 9 Am.

Jur., Carriers, section 286, pages 607-608, and in 13 C. J. S., Carriers, section 27, pages 61-62.

In *Burlington Transp. Co. v. Hathaway (Iowa, 1943)*, 12 N. W. 2d 167, a suit was brought by certain common carriers as plaintiffs against the teamsters, chauffeurs, warehousemen and helpers union and its business agents as defendants to enjoin the latter from requiring employees of the union to refuse to handle the goods of John Blaul's Sons Company, a wholesale grocery company in Burlington, Iowa, which the union was attempting to organize. A picket line had been thrown around the grocery company and the employees of the union refused to transport freight for the grocery company. The Iowa statute as to nondiscrimination by carriers is similar to Kentucky's. The substance of the court's decision is as follows:

> "When the plaintiffs obtained their permits to operate as common carriers, they undertook the duty to transport the freight which the public tendered to them for transportation. The failure to carry out this duty to transport would not be excused by showing that its employees refused to obey the employers' order. See Chicago B. & Q. R. Co. v. Burlington, C. R. & N. Ry. Co., et al., C. C. 34 F. 481, and Consolidated Freight Lines, Inc., et al., v. Department of Public Service, et. al., 200 Wash. 659, 94 P. 2d 484, 485. In the last cited case a strike of laundry workers at the Davenport Hotel in Spokane resulted in a picket line around that hotel. Certain common carrier truck lines, who had been serving the hotel in the capacity of picking up freight or baggage and delivering it anywhere in the State of Washington or in the channels of interstate commerce, refused to send their trucks through the picket line at the hotel because the local manager of the teamsters' union threatened to call a strike of the carriers' drivers if they were permitted to go through the picket line. The hotel filed a complaint with the Department of Public Service against the carriers for the cancellation of their permits as common carriers. This resulted in an order suspending temporarily the permits under which the carriers

operated. Upon appeal the action of the Commission was affirmed, the Supreme Court of Washington stating: 'The question then arises whether the appellants were excused by reason of the law. They being common carriers, it was their duty, under the facts and circumstances of this case, to send their trucks through the picket line. 13 C.J.S., Carriers, p. 407, sec. 202; Moore on Carriers, 2d Ed., Vol. 1, p. 124; Chicago, B. & Q. R. Co. v. Burlington, C. R. & N. Ry Co., C. C. 34 F. 481; Burgess Bros. Co. v. Stewart, 112 Misc. 347, 184 N. Y. S. 199.'

• • • • • • • •

"From the above it is clear that if the plaintiffs were to do that which the union sought to compel them to do, namely, not handle the Blaul merchandise, they would be doing an act prohibited by the common law and the statutory law of this state and an act that could subject them to criminal prosecution.

• • • • • • • • •

"There was no labor dispute between plaintiffs and their employees or between plaintiffs and the defendant union. The union cannot concertedly exert, in aid of their labor dispute with Blaul, any economic pressure to compel these plaintiffs to do that which the law and public policy forbid. The injunction was rightly issued."

These cases support the rule laid down in the Hathaway case: *Pacific Gamble Robinson Co. v. Minneapolis & St. Louis R. Co., (D. C. Minn., 1952)* 105 F. Supp. 794; *Northwestern Pacific R. Co. v. Lumber & Sawmill Workers Union, etc., (Cal., 1948)* 189 Pac. 2d 277; *Turner v. Zanes, (Tex., 1947)* 206 S.W. 2d 144.

Counsel for Local 89 admit that the Hathaway case correctly sets forth the law on the issue raised by the appeal as of the date it was described, namely, in 1943, but they insist that the Labor-Management Relations Act of 1947, commonly called the Taft-Hartley Act, 61 Stat. 136 (1947), 29 U. S. C. A., Sec. 151, et seq., (Supp. 1952), makes the question under discussion one exclusively controlled by this enactment. To fortify this position, reliance is had upon

this part of 29 U. S. C. A., Sec. 158, also known as 8(b)(4)(D) of the Act, which is as follows: "* * * provided, that nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer) if the employees of such employer are engaged in a strike ratified or approved by representative of such employee whom such employer is required to recognize under this sub-chapter."

The appeal involves the refusal of employees of common or contract carriers who are not on strike but who happen to belong to Local 89, the bargaining representative of Suppliers' employees, to transport the merchandise of American through the picket line at 17th and Broadway Streets, and this disobedience is not complained of as an unfair labor practice but as a violation of the common law, the statutory law and the Constitution of Kentucky. Aside from this, as we have shown, the illegal conduct of the employees could subject them to criminal prosecution. We find nothing in the provisions of the above Act or in the decisions of the Supreme Court of the United States construing it that makes such conduct legal when from time immemorial the several states have branded it as illegal. Furthermore, the Supreme Court has taken the position that federal jurisdiction cannot be invoked to protect a course of action, such as that in this case, that would be in conflict with the declared public policy of a state. See *Local Union No. 10 v. Graham*, 344 U. S. 811, and the cases cited therein. It follows that the portion of the injunction requiring performance of the duty to carry American's goods in no way impairs the right to strike, the right to picket or any other right guaranteed by the federal law or the Constitution of the United States but that the order does, on the contrary, enforce obedience to the law and Constitution of the Commonwealth and, as a consequence, it was proper.

Finally, the employees of the carriers rely upon a pro-

vision of the agreement between themselves and their employers covering the period from February 1, 1952, to January 31, 1955, to the effect that it shall not be a violation of their contract or a cause for discharge to refuse to go through the picket line of a union or to refuse to handle unfair goods. They insist that this stipulation excuses them from serving American. The legal duty of a common carrier to handle the merchandise of a shipper without discrimination existed long before the contract came into being, and, by like token, employees of such carriers, as long as they voluntarily remain in the hire of their employer, do not have the lawful right to withhold their services from a particular customer who deals with their employer. Here the common carrier and its employees seek by a contractual provision to avoid the responsibility imposed by a statute which implements a constitutional provision, and we hold that such a contractual stipulation is void.

The question of whether a contempt has been committed is left for the Chancellor's determination. Our reason for this ruling is that the contempt, if any, is continuous in its nature and it should not be handled piecemeal. Besides, the Chancellor is on the ground, is familiar with the background of this suit and is in a better position to hear the evidence; therefore, this phase of the case can be more expeditiously handled for all concerned in the lower court.

It appears to us that an emergency exists in this case and a mandate shall issue forthwith without prejudice to the right to file a petition for rehearing.

The judgment is affirmed on the appeal and on the cross-appeal.

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APPENDIX C

Said Judgment entered in Court April 23, 1953, in Judgment Book 124, page 43 and 44, is as follows, to-wit:

JEFFERSON CIRCUIT COURT
CHANCERY BRANCH
SECOND DIVISION

THE AMERICAN TOBACCO COMPANY, INC., *Plaintiff.*

vs.

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. OF L., an unincorporated labor union, et al., *Defendants.*

Judgment

At a court held on April 22, 1953:

The Court, having considered the entire record herein, heard proof offered by both parties in open court, and considered further proof offered by affidavits and exhibits, and arguments of counsel, and being advised, rendered a written opinion on April 21, 1953, which is hereby made part of the record,

And the parties agreeing that the order heretofore issued herein on April 6, 1953, and denominated a "Restraining Order," having been issued upon notice and after hearing; may be considered a temporary injunction rather than a restraining order for all purposes of this action,

And the parties further agreeing that all the proof herein, including affidavits, may be considered by the Court as evidence upon the plaintiff's motion for a permanent injunction, as well as upon its motion for a temporary injunction and defendants' motion to dissolve the same, both of which agreements are hereby made a part of the record herein,

And the Court being of the opinion that the said temporary injunction, presently in effect should be modified, and a permanent injunction issued in lieu thereof, upon the terms hereinafter set out, and plaintiff and defendants all having advised the Court, as is now and hereby certified, that each of them desires to appeal to the Court of Appeals from the judgment modifying said temporary injunction and granting said permanent injunction,

It Is Ordered, that the temporary injunction heretofore in effect may be and hereby it is, modified and made into a permanent injunction, upon the following terms:

PERMANENT INJUNCTION

That the defendants, General Drivers, Warehousemen and Helpers, Local Union No. 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an unincorporated labor union; Paul W. Priddy, Joseph Burrell, Stoy Decker, Willard Marples, James Mallory, Alma Harper, individually, and as representatives of a class consisting of members of General Drivers, Warehousemen and Helpers, Local Union No. 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an unincorporated labor union, and each of them, and all members of said unincorporated labor union, and their confederates and associates, may be and hereby they are permanently enjoined:

1. From picketing or maintaining pickets or attempting to picket or maintain pickets at or about plaintiff's premises in excess of three pickets on each side (North, East, South, and West) plus one picket captain, making a maximum of thirteen persons at or about plaintiff's premises and within two hundred (200 feet thereof at any time);

2. From causing or threatening injury to the persons or property of the employees of plaintiff, or the physical property of plaintiff;

3. From using abusive, vile, profane, or threatening lan-

guage to plaintiff's employees or others seeking to enter or leave plaintiff's premises or to do business with plaintiff;

4. From causing, aiding or abetting any common carrier or contract carrier unreasonably to discriminate against plaintiff by refusing while remaining an employee thereof, or inducing, encouraging, coercing or otherwise causing or arranging with common or contract carriers or any persons connected therewith to refuse to accept, handle, transport, and deliver, in accordance with their legal and contract obligations, property shipped by or to plaintiff, so long as property is being handled, transported and delivered by or to other customers of such contract or common carriers.

Provided, however, that for a period of twenty days from this date, to-wit, until May 12, 1953, at 5:00 o'clock P. M., or such earlier time as the Court of Appeals may order otherwise, the temporary injunction aforesaid of April 6, 1953, may be and hereby it is continued in force upon its original terms, and the terms of this permanent injunction shall be and become binding upon the dissolution or modification of said temporary injunction, unless the Court of Appeals shall order otherwise.

So long as said temporary injunction remains in force, the bond heretofore given by plaintiff herein shall remain in effect. To all of which the Plaintiff and Defendants object and except and pray in appeal to the Court of Appeals which is hereby granted.

/s/ STUART E. LAMPE,
Judge.

/s/ STITES, WOOD, HELM & TAYLOR,
Counsel for Plaintiff.
/s/ HARDY & LOGAN,
Counsel for Defendants.

APPENDIX C

Supreme Court of the United States

No. .....

OCTOBER TERM, 1953

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, etc., et al.,
Petitioners.

vs.

THE AMERICAN TOBACCO COMPANY, INC.

Order Extending Time to File Petition for Writ of Certiorari

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 3, 1954.

/s/ Stanley Reed,
Associate Justice of the Supreme Court of the United States.

Dated this 23rd day of April, 1954.

FEB 2 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

NO. 186

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 89, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. OF L., an Unincorporated Labor Union; PAUL W. PRIDDY, JOSEPH BURRELL, STOY DECKER, WILLARD MARPLES, JAMES MALLORY, ALMA HARPER, Individually, and as Representatives of a Class consisting of Members of General Drivers, Warehousemen and Helpers, Local Union No. 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an Unincorporated Labor Union.

Petitioners,

v.

THE AMERICAN TOBACCO COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

BRIEF FOR PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

NO. 186

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 89, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. OF L., an Unincorporated Labor Union; PAUL W. PRIDDY, JOSEPH BURRELL, STOY DECKER, WILLARD MARPLES, JAMES MALLORY, ALMA HARPER, Individually, and as Representatives of a Class consisting of Members of General Drivers, Warehousemen and Helpers, Local Union No. 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an Unincorporated Labor Union.

Petitioners,

v.

THE AMERICAN TOBACCO COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Kentucky Court of Appeals entered on June 2, 1953 (R. 70-78) was modified on petition for rehearing (R. 95) and as so modified (R. 95-103) is reported at 264 S.W. 2d 250. The opinion of Judge Lampe in the Jefferson Circuit Court, Chancery Branch (R. 22-33) is unreported.

JURISDICTION

The jurisdiction of this Court is invoked on the ground that the highest court of the State of Kentucky in which a decision could be had has affirmed a permanent injunction (R. 35-37) which invades the area of labor relations law preempted by, and conflicts with, the provisions of the Labor Management Relations Act (29 U. S. C. 141, *et seq.*) and similarly invades the area of interstate commerce law preempted by, and conflicts with, the provisions of the Interstate Commerce Act (49 U. S. C. 316 (d), 316 (e) and 322 (b)). The jurisdiction of this Court rests upon 28 U. S. C. 1257 (3).

The judgment of the Court of Appeals of Kentucky was entered on June 2, 1953 (R. 70). A petition for rehearing was filed by petitioners on August 1, 1953, (R. 79). An order modifying the opinion of June 2, 1953, and overruling the petition for rehearing was entered on February 5, 1954 (R. 95).

On April 23, 1954, an order was signed and entered in this Court by Mr. Justice Stanley Reed, extending the time within which to file a petition for writ of certiorari to and including July 3, 1954 (R. 104).

The petition for writ of certiorari was filed on July 2, 1954, and certiorari was granted on October 14, 1954 (R. 104-105).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Constitution of the United States (Article I, Section 8 and Article VI, Clause 2), of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., 141, *et seq.*), of the Interstate Commerce Act (49 Stat. 558, 54 Stat. 924, 49 U. S. C. 316 (d), 316 (e), 322 (b)), of the Constitution of Kentucky (Section 196), and of Kentucky Revised Statutes (Sections 281.600, 281.610, 281.685, 336.130) are set forth in the Appendix, *infra*, p. 92.

QUESTIONS PRESENTED

1. Does a state court have jurisdiction or power to compel "by injunctive process" union members, engaged in driving common carrier motor vehicles in interstate commerce and covered by a collective bargaining agreement permitting them to respect picket lines, "to cross a picket line advertising a lawful strike" conducted against another employer by other members of that same union, on the sole ground that a refusal to cross such picket line interferes with a duty imposed by state law on common carriers to deliver to all customers without discrimination,[1]

(a) in view of those sections of the Labor-Management Relations Act of 1947[2] protecting the right of employees to refuse to enter the premises of another employer whose employees are engaged in a lawful strike; or

(b) in view of those sections of the Interstate Commerce Act[3] making it unlawful for any common carrier by motor vehicle to subject any person to any unjust discrimination, and giving the Interstate Commerce Commission exclusive and primary authority to determine whether any discrimination has been engaged in, and giving the federal district courts jurisdiction to enjoin such discriminatory activities upon application of the Interstate Commerce Commission?

2. Does a state court have jurisdiction or power to enjoin the use of or to declare illegal an agreement between a common carrier and a union representing its employees, under which such employees are permitted to respect picket lines without fear of discharge, under the circumstances and in view of the considerations set forth in Question 1 above?

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[1] The verb "compel" and the quotations herein are from the statement of the question as framed by the Kentucky Court of Appeals below (R. 19).

[2] Section 7, the proviso to Section 8(b), Section 13, Section 501(2) and Section 502.

[3] 49 U.S.C. §316(d), 316(e), and 322(b).

STATEMENT OF THE CASE

The Certification of Local 89 by the National Labor Relations Board

On February 5, 1953, the National Labor Relations Board certified the General Drivers, Warehousemen and Helpers, Local Union No. 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A.F.L., hereinafter called Local 89, as the exclusive bargaining representative of a unit composed of all non-supervisory employees including truck drivers of the American Suppliers, Incorporated, hereinafter called American Suppliers, at its operation in Louisville, Kentucky, (Tr. 224-225).[4] Thereafter Local 89 attempted to negotiate a contract with the American Suppliers, and when they were unable to come to terms, called a strike of the employees of American Suppliers in support of their bargaining demands. The strike began on March 30, 1953 (R. 4, 52, 60-61, 71, 96, Tr. 227-228).

The Complaint Filed in the Kentucky Courts

On April 4, 1953, the instant case was begun by the filing in the Jefferson Circuit Court, Chancery Division, of Kentucky, of a petition in equity in which the American Tobacco

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[4] The unit description as it appears in the certification issued by the National Labor Relations Board (Case No. 9-RC-1743) is as follows:

> "All employees of the employer at its operation in Louisville, Ky., including ; ck drivers, fork lift operators, male and female redryers, storage men, mechanics and maintenance men and stemmery and seasonal employees, but excluding office clerical, engineers, time-keeping, watchmen, guards, foremen and all other supervisors within the meaning of the Act."

The Board's direction of election and certification in the above case are unreported. The Board's decision dismissing for inappropriateness of the unit requested, an earlier petition filed by Local 89 in which it sought to represent only a portion of the above described unit is reported in *American Suppliers, Inc.*, 98 N.L.R.B. 692 (9-RC-1424, March 17, 1952).

Company, Incorporated, hereinafter called American Tobacco, was the sole plaintiff, and Local 89 and certain individuals as representatives of a class consisting of members of Local 89 were the defendants (R. 1-2). The petition alleged that Local 89 and its members were picketing the gates to the American Tobacco plant in Louisville, Ky., although the only dispute which Local 89 had was solely with American Suppliers and not with American Tobacco (R. 3-4). While admitting that American Tobacco owned the majority of stock of American Suppliers, has purchased tobacco from American Suppliers and operated a plant located immediately in front of the American Suppliers plant, it was alleged that the two businesses were entirely different, that no such purchases of tobacco had been made since the beginning of the strike, and that the principal entrances to the two plants were separate (R. 3-4). The American Suppliers was not named as a party.

The petition described the business of the American Tobacco as "nationwide" with substantial movements in interstate commerce of raw materials and supplies to, and finished products from, its Louisville plant (R. 2). It was alleged that Local 89 has "induced, encouraged, coerced and conspired with" common and contract carrier truck lines and their employees to refuse to receive interstate shipments of goods to or from the American Tobacco's plant in Louisville, Kentucky (R. 6).

The conduct of Local 89 was alleged to have been wrongful in that it "attempted to draw into their dispute with American Suppliers, Incorporated, strangers to their dispute, to-wit: Plaintiffs and its employees, its suppliers, its customers and other persons with whom plaintiff does business, none of whom are within the sphere of the dispute between the defendants and American Suppliers" (R. 4-5; cf. R. 6). The picketing was alleged to have been "in violation of public policy and the law of the State of Kentucky" (R. 4). And it was alleged that Local 89 had induced various persons, firms and corporations "to refuse to enter into or

perform contracts with plaintiff in accordance with their legal obligations to plaintiff and their duties as common carriers" (R. 6-7).

The Temporary Restraining Order Issued by the Kentucky Courts

Both temporary and permanent injunctive relief was sought (R. 7-8). A temporary restraining order was issued on April 6, 1953, enjoining Local 89 and each of its members from picketing the principal entrances to the American Tobacco plant, from refusing to handle property shipped to or by American Tobacco and from inducing or arranging with common carriers or their employees not to handle such property (R. 10-11).

By its answer Local 89 alleged that by virtue of the interstate character of the operations of each American Tobacco and American Suppliers and by virtue of the statutes of the United States, jurisdiction to enjoin unfair labor practices including alleged secondary boycotting activities is vested exclusively in the Federal Courts in suits initiated exclusively by the General Counsel of the National Labor Relations Board (R. 13-14, 16).

The Evidence Adduced at the Hearing in the Kentucky Courts

The case was then set down for hearing on the application for permanent injunction on April 14, 1953, at which time evidence was taken. In addition to extensive evidence directed to the issue of whether picketing at the gates of American Tobacco constituted primary or secondary picketing, the evidence also established that the employees of the common carriers which refused to receive shipments to or from American Tobacco were members of Local 89, employed under a contract which permitted them to refrain from crossing picket lines or handling unfair goods (R. 19-22, 49-50, 63, 99, 102-103). Thus Article IX of the contract between Local 89 and the carriers, known as the Central

States Area Over-the-Road Motor Agreement, for the period from February 1, 1952, to January 1, 1955, provided (R. 21-22):

> "It shall not be a violation of this contract and it shall not be cause for discharge if any employee or employees refuse to go through the picket line of a Union or refuse to handle unfair goods."

Similarly Section 3(c) of Article II of the agreement between Local 89 and other unions and Over-the-Road Truck Operators and other carriers at all times here material provided (R. 19, 21, Tr. 119 (e)):

> "It shall not be considered a violation of this Agreement for employees covered hereunder to refuse to cross a picket line of a Union or refuse to handle unfair goods. The term unfair goods, as used in this section includes, but is not limited to, any goods or equipment transported, interchanged, handled, or used by any carrier, whether party to this Agreement or not, at whose terminal or terminals or place of business there is a controversy between such carrier or its employees on the one hand and a labor union on the other hand; and such goods or equipment shall continue to be 'unfair' while being transported, handled, or used by the interchanging of succeeding carriers whether parties to this Agreement or not, until such controversy is settled."

The Opinion and Judgment of the Kentucky Trial Court

On April 22, 1953, the trial court handed down an opinion rejecting Local 89's contention that exclusive jurisdiction of the cause of action asserted was vested in the National Labor Board and the Federal Courts by the Labor Management Relations Act (R. 25-27). It found that American Suppliers was a wholly owned subsidiary of American Tobacco and that "Geographically the two companies are so closely enmeshed as to make it almost impossible to separate them" (R. 29-30). The trial court accordingly held that Local 89 "has the right peacefully to picket American Tobacco"

(R. 31). However, in dealing with the right of the pickets to induce persons not to make deliveries of property to American Tobacco, the trial court held that the fact that American Tobacco was not a party to the labor dispute made such inducement a violation of Kentucky law. In this connection the trial court stated (R. 26-27):

> "If the Union pickets American Tobacco when it has no dispute whatsoever with American Tobacco, (conceding for the purposes of this discussion that American Tobacco is a stranger to this labor dispute), and by so doing coerces or influences persons not to make deliveries of needed merchandise and material to American Tobacco, the American Tobacco Company is placed in a position to suffer irreparable damages. * * * It may be that this wrong constitutes a secondary boycott which could give rise to a remedy under the Taft-Hartley Act. But that wrong also constitutes a violation of Kentucky law in a field not covered exclusively by the Federal Act. It is violative of the Kentucky Constitutional provisions, which seek to protect the private property of our citizens and also contrary to K. R. S. 336.130, not necessarily because it is a secondary boycott but because it is an unfair and illegal act calculated to cause irreparable damage to plaintiff."

In the foregoing opinion the trial court made no reference to any alleged interference by Local 89 with the performance by common carriers of their alleged duty to serve all shippers and consignees. However, on April 23, 1953, the trial court filed a "Memorandum Opinion on Terms of Injunction" in which it recited plaintiff's contention that the threat of members of Local 89 who were also employees of common carriers to refuse to make deliveries to American Tobacco violates Kentucky Revised Statutes 281.685 wherein a common carrier is enjoined from subjecting any person to any unreasonable discrimination and other provisions of the same chapter making it unlawful for any person to cause, aid or abet such discrimination (R. 34). The trial court stated its opinion that the permanent injunction should restrain such unlawful discrimination (R. 35).

The judgment entered on April 23, 1953, permitted picketing, but enjoined Local 89 and each of its members from maintaining excessive numbers of pickets, from threatening injury to persons or property, from using abusive language and (R. 36-37):

> "4. From causing, aiding or abetting any common carrier or contract carrier unreasonably to discriminate against plaintiff by refusing while remaining an employee thereof, or inducing, encouraging, coercing or otherwise causing or arranging with common or contract carriers or any persons connected therewith to refuse to accept, handle, transport, and deliver, in accordance with their legal and contract obligations, property shipped by or to plaintiff, so long as property is being handled, transported and delivered by or to other customers of such contract or common carriers."

The effect of the above-quoted portion of the judgment is to require members of Local 89 who are employed by common carriers to cross the valid picket line established by Local 89 at the situs of its primary dispute with American Suppliers. This is the construction which has been placed on the similar language contained in the temporary restraining order issued in this case, in proceedings in which members of Local 89 have been held guilty of contempt solely for refusing to cross the valid picket line maintained at American Suppliers.[5]

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[5] The temporary restraining order above referred to contained a clause reading as follows (R. 9):

> "From refusing or inducing, encouraging, coercing or otherwise causing or arranging with, the employees of other employees (sic), particularly common carriers, or with such employers, to refuse to accept, handle, transport and deliver in accordance with their legal and contract obligations, property shipped by or to plaintiff."

Certain of Local 89's members employed by a common carrier respected the picket line at the premises of American Suppliers and solely because of their refusal to cross this picket line were found guilty of contempt of court for violating such order (R. 32-33, 39-40).

Another example of the construction given the above-quoted por-

Local 89 was not held in contempt because it had not only ceased inducing its members not to make deliveries but had also informed the interstate carriers that it would not intervene should they discharge such employee members of Local 89 as refused to cross the picket line to transport property to and from American Tobacco and had in fact not objected when such a discharge of a union member did in fact occur (R. 19-20, 33, 40). While no review of these contempt proceedings is here involved, this construction of the language of the temporary restraining order is relevant to show that the similar language in the permanent injunction which is before this Court for review, has the same meaning and effect.

Although the record disclosed that almost all of the shipments by common or contract carriers to and from American Tobacco were interstate in character (R. 6, 12, 27, 38, 41, 42, 51, 52, 53, 58), the decree made no distinction between common carriers subject to the Interstate Commerce Commission under the Interstate Commerce Act and carriers involved in purely intrastate operations.

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tion of the final decree is seen under a rule to show cause why contempt should not lie for the action of certain members of Local 89 employed by the Middle West Freightways, Inc., a common carrier, in refusing to pick up a shipment at American Tobacco for delivery to Kansas City, Mo., the refusal being occasioned by the refusal to cross the picket line (R. 37-38, Tr. 141). The rule was respited until May 18, 1953 (Tr. 145), and the record does not reveal any further disposition of this matter.

Respondents, in their Response to the Petition for Writ of Certiorari, pp. 4, 5 and 16, argue that Local 89 was not a party to any refusal to cross the picket line for the reason that it had expressly instructed its members to cross the picket line at the American Tobacco plant. However, the record discloses that this position of the union was taken only after the issuance of the temporary restraining order in this case and was prompted solely out of respect for such order (R. 12, 19-20, 33, 38, 44, 47-50, 54-55, 60-61, 62, 63).

The Opinion and Judgment of the Court of Appeals of Kentucky

Local 89 and its members prosecuted an appeal to the Court of Appeals of Kentucky from paragraph 4 of the permanent injunction (R. 36-37), quoted above, which required Local 89 and its members to forego its contracts with interstate carriers permitting respect for picket lines and nonhandling of unfair goods and which also required the members of Local 89 to cross picket lines to make deliveries to American Tobacco. The Court of Appeals affirmed the judgment of the trial court in all respects (R. 103).[6] The court stated the question which was before it as follows (R. 96):

> "May a driver of a common or contract carrier be compelled against his wishes by injunctive process to cross a picket line advertising a lawful strike, when the driver is a member of the same union that is conducting the strike but he is not on strike himself?"

The gist of the answer which the Court of Appeals of Kentucky gave to this question is that while employees of a common carrier are free to strike they may not "refuse to handle freight for American while remaining in the service of their employer" (R. 99). This answer was based on that court's view that the duty of a common carrier to serve all members of the public without discrimination is imposed by the common and statutory law of Kentucky not merely on the carrier but also on its employees (R. 99). The Court of Appeals further held that the existence of a lawful picket line at the premises of the customer whether established by the union to which the carrier's employees belonged or by some other union did not constitute a valid excuse for failing to deliver goods to or from the customer so long as

[6] American Tobacco took a cross appeal from the denial of the trial court of its prayer that all picketing of its premises be enjoined, but was likewise unsuccessful before the appellate court with respect to this issue (R. 95-99, 103). No issue arising out of the cross appeal is before this Court.

the employees continued to serve non-picketed customers (R. 100-102).

The Court of Appeals rejected the contention of Local 89 that the Taft-Hartley Act both vested exclusive jurisdiction of the subject matter in the National Labor Relations Board and by the proviso to Section 8(b) expressly protected the right of an employee to respect a picket line at the premises of an employer whose employers are on strike under the auspices of the union certified as their representative (R. 101-102). In this respect the court stated as follows (R. 102):

> "The appeal involves the refusal of employees of common or contract carriers who are not on strike but who happen to belong to Local 89, the bargaining representative of Suppliers' employees to transport the merchandise of American through the picket line at 17th and Broadway Streets, and this disobedience is not complained of as an unfair labor practice but as a violation of the common law, the statutory law and the Constitution of Kentucky. Aside from this, as we have shown, the illegal conduct of the employees could subject them to criminal prosecution. * * * It follows that the portion of the injunction requiring performance of the duty to carry American's goods in no way impairs the right to strike, the right to picket or any other right guaranteed by the federal law or the Constitution of the United States."

In addition, the Court of Appeals found that the agreement between Local 89 and various common carriers, permitting members of Local 89 to respect picket lines, was invalid as an interference with the common law duty of the common carrier to make deliveries to all customers without discrimination. The Court of Appeals stated in this connection (R. 102-103):

> "Finally, the employees of the carriers rely upon a provision of the agreement between themselves and their employers covering the period from February 1, 1952, to January 31, 1955, to the effect that it shall not be a violation of their contract or a cause for discharge

to refuse to go through the picket line of a union or to refuse to handle unfair goods. They insist that this stipulation excuses them from serving American. The legal duty of a common carrier to handle the merchandise of a shipper without discrimination existed long before the contract came into being, and, by like token, employees of carriers, as long as they voluntarily remain in the hire of their employer, do not have the lawful right to withhold their services from a particular customer who deals with their employer. Here the common carrier and its employees seek by a contractual provision to avoid the responsibility imposed by statute which implements a constitutional provision, and we hold that such a contractual provision is void."

The Court of Appeals disposed of the petition for rehearing simply by adopting its previous opinion with some minor modifications (R. 95). Thus the Court of Appeals rejected, without opinion, the contention of Local 89, raised specifically on rehearing (R. 84-94), that jurisdiction to define duties of interstate common carriers engaged in interstate commerce lies exclusively in the Interstate Commerce Commission under the Interstate Commerce Act. The Court of Appeals did, however, consider, and pass upon by rejecting, this contention as well as all others made in the petition for rehearing (R. 103-104).

SUMMARY OF ARGUMENT

I.

A. The injunction issued by the Kentucky courts is invalid because it exercises control over a subject matter which has been federally preempted by the Labor Management Relations Act. The injunction restricts Local 89 in the extent to which it may peacefully induce employees and nonemployees not to cross the picket line established as an incident of the strike which the local, as the federally certified agent of employees of American Suppliers, is conducting in support of its bargaining demands. The effect of the

injunction is to define the permissible area of economic combat within which Local 89's labor dispute with American Suppliers is to be conducted.

Congress by the Labor Management Relations Act defined the permissible area of economic combat within which disputes by federally certified bargaining agents are to be conducted. It drew a careful line between those persons, whether employees or not, so remote from the immediate dispute as to exclude their proper concern and those sufficiently closely related to the dispute as to warrant their permissible participation. Congress by Section 8(b) (4) of the National Labor Relations Act, as amended, made it an unfair labor practice for a union or its agents to induce employees to refuse to handle or transport property where the purpose of such refusal was to cause their employer to cease doing business with someone else, subject to the exception stated in the proviso to Section 8(b) that employees are not prohibited from refusing to enter on the premises of an employer against whom an authorized bargaining agent is conducting a strike. Congress by Section 7 preserved to employees the right to engage in all acts of assistance to unions and all concerted activities for mutual aid or protection which were not outlawed by Section 8(b) as unfair labor practices.

Congress vested in the National Labor Relations Board and the federal courts exclusive jurisdiction to administer the foregoing provisions of the National Labor Relations Act, as amended. In deciding cases the Board and the courts have given concrete expression to the Congressional intent that the area of economic combat be restricted to persons whose duties may bring them to the situs of the primary dispute. A whole body of federal precedents governs the determination as to whether the relationships between two affiliated companies, such as American Suppliers and American Tobacco, require that American Tobacco be treated as a secondary rather than a primary employer. Likewise, decisions define the situs at which picketing may

be conducted; the propriety of noncoercive appeals to carriers, their supervisory and managerial force, as distinguished from their employees, not to serve a strike customer; the validity of collective bargaining contracts permitting respect for picket lines or non-handling of unfair goods.

Congress did not except from the area federally preempted the regulation of labor relations of common carriers by motor vehicle. To the contrary, it expressly forbade cession to the states of labor problems in "transportation except where predominantly local," even where state laws respecting labor relations are not inconsistent with federal laws. Section 10(a). This was in accord with the policy reflected in other provisions of the Act of assuming full federal control and excluding states from governing labor relations of all industries, including industries peculiarly critical to local welfare. *Bus Employees* v. *Wisconsin Board*, 340 U. S. 383. The National Labor Relations Board and the courts have therefore held that the Labor Management Relations Act governs the labor relations aspects of picket line inducement of employees of common carriers by motor vehicle.

The Interstate Commerce Act governs the extent of a common carrier's duty to serve without unjust discrimination. If any exception from generally applicable federal labor law is to be made in favor of common carrier duties, it is for Congress or the National Labor Relations Board or the Interstate Commerce Commission to establish the rule in the first instance, subject to review by the federal courts, and not for the state courts. *Garner* v. *Teamsters Union*, 346 U. S. 485; *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 439, 440, 448.

B. The injunction issued by the Kentucky courts is further invalid because it conflicts with the Labor Management Relations Act. It drastically curtails the members of Local 89 in their efforts to secure a collective bargaining contract for the non-supervisory employees of American Suppliers,

for whom the local has been certified by the National Labor Relations Board as their exclusive collective bargaining representative. The practical effect of the injunction entered is to limit the collective bargaining power of Local 89 and its members in much the same way as collective bargaining power was limited in the Michigan strike vote statute and the Wisconsin Public Utility Anti-Strike Act which were for that reason held invalid as in conflict with federal law in *Auto Workers* v. *O'Brien*, 339 U. S. 454 and *Bus Employees* v. *Wisconsin Board*, 340 U. S. 383.

Instead of purporting to limit the right to strike, Kentucky has permitted the strike but so drastically limited the support therefor which members of Local 89 may give or seek as to make the right to strike almost meaningless. This it has done by compelling members of Local 89 who are employed by interstate carriers to cross picket lines established at American Suppliers, even though their terms of employment expressly exclude such work. By compelling members of the local to cross the picket line established at American Suppliers, when Sections 7 and the proviso to Section 8(b) protect their refusal to cross, the injunction below deprives employees of their rights under federal law.

The injunction further deprives Local 89 and its members of valuable provisions in their collective bargaining contracts with common carriers. The Kentucky court expressly held void, and by its injunction required disregard of, the contractual provisions by which members of Local 89 had secured the agreement of carriers to what was in effect a job description which excluded crossing of picket lines and handling of "unfair goods" from the scope of employment. Where, as here, interstate carriers have voluntarily entered into collective bargaining contracts containing clauses permitting respect for picket lines and non-handling of "unfair goods," such clauses are valid under federal law. *NLRB* v. *Rockaway News*, 345 U. S. 71, 80, 81; *Rabouin* v. *NLRB*, 195 F. 2d 906, 912 (C. A. 2). Cf. *Teamsters Union (McAl-*

lister Transfer, Inc.), 110 NLRB No. 224, 35 LRRM 1281 (December 16, 1954).

II.

The application by Kentucky of its state laws defining the duties of a common carrier also intruded upon the area preempted to the Interstate Commerce Commission by the Federal Motor Carrier Act. The carriers involved were, with possible exceptions not here material, interstate. The Federal Motor Carrier Act conferred on the Interstate Commerce Commission exclusive primary jurisdiction to issue cease and desist orders which define the duty to serve without discrimination. *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 439. Within its jurisdiction is the determination of a carrier's duties, if any, to serve customers who are being picketed. *Montgomery Ward & Co., Inc.* v. *Chicago, Milwaukee, St. Paul & P. R. Co.*, 268 I.C.C. 257. The Kentucky court defined these duties as the basis for an injunction requiring employees of interstate carriers to conform to state standards of service. This injunction exceeded the powers of state courts.

The Interstate Commerce Commission has held that interstate common carriers by motor vehicle may properly establish a practice of not providing pick up and delivery service through picket lines at the place of business of the customer. The Commission has held that the establishment of such a practice constitutes a proper delimitation by the carrier of the extent of its holding out of service. *Pick Up and Delivery Restrictions in Official Territory*, 269 I.C.C. 191, 192-193. Since the collective bargaining contracts here entered into between the carriers and Local 89, proceeded on the assumption that the carriers would not hold themselves out to serve picketed customers, and since the carriers did not so hold themselves out, Kentucky has required the carriers and their employees to extend the scope of services offered by the carriers. The injunction thus conflicts with decisions of the Interstate Commerce Commission.

ARGUMENT

I.

The Labor Management Relations Act of 1947 precludes Kentucky from applying its laws defining the duties of a common carrier, to invalidate collective bargaining contracts with interstate carriers permitting respect for picket lines and non-handling of unfair goods and to compel crossing of picket lines by members of a federally certified union striking for bargaining demands.

A. The Labor Management Relations Act preempts the field of labor relations with which the Kentucky courts dealt when they compelled members of Local 89 to cross picket lines and invalidated contracts permitting such respect for picket lines.

Congress has made every act by which a union or its agents involve, or attempt to involve, other persons, whether employees or not, in a labor dispute, either a lawful act which the National Labor Relations Board is directed to protect from interference or an unlawful act which the National Labor Relations Board is directed to enjoin. Section 7 of the National Labor Relations Act, as amended, protects all acts of employees or their labor organizations to assist labor unions except insofar as those acts are made unfair labor practices by Section 8(b) of the Act. Congress has drawn a careful line between the protected and the prohibited. It has established machinery both to protect and to prohibit. Whenever a state intrudes it upsets the balance of power established by federal law. Even were the state to attempt to apply the same rules as the federal government, it would create chaos to have the possibility of different decisions by the state agency. Hence the state must keep out.

1. The Labor-Management Relations Act preempts the regulation of economic area within which employees or unions may give or seek support for a valid primary strike against an employer subject to the Act.

The original National Labor Relations Act was enacted in the same Congressional atmosphere as the Norris-LaGuardia Act (29 U. S. C. 101, *et seq.*) They both reflected the failure of the courts to recognize that "Just as conditions of labor in one shop react upon conditions of labor in another shop of the same craft, so conditions of labor in the craft as a whole influence labor conditions in other but allied crafts."[7]

This Court stated with respect to the Norris-La Guardia Act that (*United States* v. *Hutcheson*, 312 U. S. 219, 231):

> "the Act explicitly formulated the 'public policy of the United States' in regard to the industrial conflict, and by its light established that the allowable area of union activity was not to be restricted, * * * to an immediate employer-employee relation." (Footnotes omitted.)

This policy of the Norris-LaGuardia Act was legislatively manifested by its statement of policy (29 U. S. C. 102) and its broad definition of "a case involving or growing out of a labor dispute" (29 U. S. C. 113 (a)) and by its definition of "labor dispute" (29 U. S. C. 113(c)). Similarly, Section 7 of both the original National Labor Relations Act and the amended Act states broadly that employees shall be protected in the right "to assist labor organizations" and "to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection" without any limitation upon the economic group which might be involved in the dispute. Section 2(3) of both the original Act and the amended Act provides that "the term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicity states otherwise" and further provides that the term "employee" shall include "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute." Section 2(9) of both the original

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[7] Frankfurter and Greene, The Labor Injunction (1930), p. 216.

Act and the amended Act defines "labor dispute" to include any controversy involving representation or terms, tenure or conditions of employment "regardless of whether the disputants stand in the proximate relation of employer and employee."

The National Labor Relations Board construed these provisions of the original Act as protecting employees in refusing to cross picket lines and in refusing to work on struck goods. It regarded each as an act of assistance to the union within the meaning of Section 7, if undertaken by the employee individually, and as a concerted activity for mutual aid or protection if undertaken by employees in concert. *Montgomery Ward & Co., Inc.*, 64 NLRB, 432, 445; *United Biscuit Co.*, 38 NLRB 778; cf. *Magnolia Petroleum*, 12 LRRM 551.

Some courts agreed. In his classic opinion in *NLRB* v. *Peter Cailler Kohler Co.*, 130 F. 2d 503, 505-506 (C. A. 2), Judge Learned Hand said:

> "When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support they engage in a 'concerted activity' for 'mutual aid or protection,' although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping, and the solidarity so established is 'mutual aid' in the most literal sense, as nobody doubts."

Judge Hand then added in language particularly significant here:

> "So too of those engaging in a 'sympathetic strike' or secondary boycott; the immediate quarrel does not itself concern them, but by extending the number of those who will make the enemy of one the enemy of all, the power of each is vastly increased. It is one thing how far a community should allow such power to grow; but, whatever may be the proper place to check

> it, each separate extension is certainly a step in 'mutual aid or protection.' Cf. *Fort Wayne Corrugated Paper Co.* v. *NLRB*, 7 Cir., 111 F. 2d, 869, 873, 874. It is true that in the past courts often failed to recognize the interest which each might have in a solidarity so obtained (e.g. *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 471, 472, 474 * * *) but it seems to us that the [Wagner] act has put an end to this."

Some courts tried to write limitations into the apparent breadth of economic involvement permitted by the Wagner Act. *NLRB* v. *Montgomery Ward & Co., Inc.*, 157 F. 2d 486 (C. A. 8), setting aside, 64 NLRB 432, 445; *NLRB* v. *United Biscuit Co.*, 128 F. 2d 771 (C. A. 7) enforcing in part and setting aside in part, 38 NLRB 778.

The Taft-Hartley Act was enacted for the express purpose of limiting the area of economic conflict permissible under federal law. During the hearings the almost unlimited breadth of the area of economic involvement in labor disputes permitted by the Norris-LaGuardia Act and the original Wagner Act was severely criticized. Senator Taft in his opening statement at the beginning of the debates on the Taft Bill, referring to these statutes said (93 *Cong. Rec.* 3834, 2 Leg. His. LMRA 1005-1006):

> "They do not distinguish between strikes for higher wages and hours and better working conditions, which are entirely proper and which throughout this bill are recognized as completely proper strikes, and strikes in the nature of secondary boycotts, jurisdictional strikes, and strikes of the racketeering variety."

Congress recognized that the drawing of a line limiting the permissible extent of economic involvement in a labor dispute would restrict labor's bargaining power. Sponsors of the Taft-Hartley Bills expressed the view that the Norris-LaGuardia Act and the original Wagner Act had overextended labor's bargaining power. Senator Taft stated (93 *Cong. Rec.* 3838, 2 Leg. Hjs. LMRA 1008):

> "The bill seeks to restore equality of bargaining pow-

er and imposes on the unions the responsibility to balance the power which they have acquired."

The sponsors of the Taft Hartley Act stated that they were engaged in a conscious process of balancing labor's need for adequate bargaining power with the interest of the public and neutrals in being free of the effects of unduly large segments of labor becoming involved in any grave labor dispute. Thus, in condemning sympathy strikes, Senator Taft stated (93 *Cong. Rec.* 4198, 2 Leg. His. LMRA 1107):

> "There is no reason that I can see why we should make it lawful for persons to incite workers to strike when they are perfectly satisfied with their conditions. . . . On that basis there can be a chain reaction that will tie up the entire United States in a series of sympathetic strikes."

It was also felt that the prohibition of sympathetic strikes and secondary boycotts was essential to safeguard employers who "are the helpless victims of quarrels that do not concern them at all." H. Rep. No. 245 on H. R. 3020, 80th Cong., 1st Sess., p. 23, 1 Leg. His. LMRA 314. To the same effect see H. Rep. *op. cit.*, pp. 4-5, 1 Leg. His. LMRA 295-296; 93 *Cong. Rec.* 4198, 2 Leg. His. 1106; 93 *Cong. His.* 4835-4836, 2 Leg. His. LMRA 1350.

At the same time Congress recognized that collective bargaining must rest on the right to strike. Thus Senator Taft said (93 *Cong. Rec.* 3835, 2 Leg. His. LMRA 1006):

> "Basically, I believe that the committee feels, almost unanimously, that the solution of our labor problems must rest on a free economy and on free collective bargaining. The bill is certainly based upon that proposition. That means that we recognize freedom to strike when the question involved is the improvement of wages, hours, and working conditions."

The sponsors of the Taft-Hartley Act believed that the traditional primary strike, with the right to picket the

premises of the primary employer and the right to respect that picket line, afforded labor ample bargaining power. Hence it attempted to frame the provisions of the amendments to retain these rights intact, while at the same time banning sympathy strikes and secondary boycotts. The language adopted carries out these intentions but leaves many borderline cases for determination by the National Labor Relations Board and the federal courts, as is apparent from our discussion of the various decisions of the Board and the courts which deal with issues raised by the factual situation considered by the Kentucky courts.

At the outset, however, it is apparent that the Court of Appeals of Kentucky did not regard Kentucky law as drawing the line between permissible economic involvement and prohibited economic involvement in a labor dispute in the same place as the federal law. For instance the Court of Appeals of Kentucky took the view that a sympathy strike by employees of common or contract carriers was permissible (R. 102), but so long as there was no such strike, employees of such carriers could not respect picket lines (R. 103). Indeed, the judgment below by its express terms compels crossing of the picket line only so long as the employees are handling, transporting or delivering property by or to other customers of such contract or common carriers (R. 37). Local 89 could have called a sympathy strike against all the common or contract carriers and thereby avoided having its members cross the picket line at American Suppliers without being in contempt. For by this device employees of carriers would not be making any discrimination among customers and it was only the duty not to discriminate which Kentucky purported to be enforcing (R. 36-37, 99-103). But, of course, such a sympathy strike would have violated Section 8(b)(4)(A) of the National Labor Relations Act, as amended. However, irrespective of whether Kentucky defined the area of economic combat permissible in the same way as the federal law it is clear that the practical effect of the decision below

is a definition by Kentucky of the economic area which might properly be involved in a labor dispute, which was the problem with which Congress was primarily concerned when it passed the Labor Management Relations Act.

Since its enactment the National Labor Relations Board and the federal courts have established a considerable body of interpretative decisions under the provisions of the Taft-Hartley Act which prohibit sympathy strikes and secondary boycotts but permit respect for primary picket lines. These decisions show that when the Board and the federal courts decide these issues they are engaged in applying the standards laid down by Congress for defining the economic area within which employees and labor organizations may properly extend their dispute.

a. The situs, which may be picketed, is governed by the Labor Management Relations Act.

The Labor Management Relations Act retained in Section 7 of the National Labor Relations Act, as amended, the language of the original Wagner Act which stated the right of employees to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." This, of course, meant that the right to strike, was continued, for this and other courts have repeatedly held that Section 7 protects the right to conduct a strike. *Bus Employees* v. *Wisconsin Board*, 340 U. S. 383, 389; *Auto Workers* v. *O'Brien*, 339 U. S. 454, 456-457; *Youngstown* v. *Sawyer*, 343 U. S. 579, 586; *Collins Baking Co.* v. *NLRB* 193 F. 2d 483 (C. A. 5); *Cusano* v. *NLRB*, 190 F. 2d 898 (C. A. 3); *NLRB* v. *Greensboro Coca Cola Bottling Co.*, 180 F. 2d 840 (C. A. 4). In order that there could be no contention that any of the broad prohibitions placed upon union conduct should be construed as limiting the right to strike Congress specifically provided (Section 13, of the Act, as amended):

"Nothing in this subchapter, except as specifically

> provided for herein shall be construed so as either to interfere with or impede or diminish in any way the right to strike, * * *"

Similiary the right to strike includes the right to picket. Indeed Congress in the Labor Management Relations Act inserted a specific provision, designed to assure that none of the limitations therein imposed on union activity should have the effect of requiring any employee to cross a valid picket line. The final proviso to Section 8(b) (4) declares that:

> "Nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act."

This proviso, when read in conjunction with the provisions of the amended Act which define the acts which constitute unfair labor practices on the part of employees (Section 8(b)) shows that Congress has made the right to picket and to respect a picket line dependent upon the situs of the picketing. Unless the picketing occurs at the situs of an employer against whom a strike is being conducted by a representative of his employees whom the employer is required by the Act to recognize, it may be unlawful not to cross the picket line, depending on whether the refusal may come within some proscribed unfair labor practice.

The language of the proviso to Section 8(b)(4) would clearly have protected the refusal of members of Local 89 to cross any picket line at the premises of the American Suppliers, if only the premises of that employer were involved, since Local 89 was the certified representative of the employees of American Suppliers who were on strike and had approved the strike. However, because of the intermingling of the premises of American Suppliers and the

premises of American Tobacco, in order to determine the applicability of the proviso the National Labor Relations Board or federal courts enforcing the National Labor Relations Act would have been required to consider the relationship between American Suppliers and American Tobacco.

The issues which would have been considered by the Board and the courts under the applicable precedents, were three in number: (1) should the corporate entity between American Tobacco and American Suppliers be disregarded so that for purposes of this dispute they were one; (2) if not, was American Tobacco a neutral outsider or was it an ally of American Suppliers; and (3) if neither of the foregoing, was the situs of the primary dispute located on American Tobacco's property.

The Kentucky courts here gave consideration to each of these questions in determining whether picketing should be permitted at the premises of American Tobacco but completely ignored these considerations when they read into Kentucky labor law an exception in favor of common carrier obligations. Indeed the Kentucky trial court here relied upon one of the leading federal cases arising under the Labor Management Relations Act as authority that the separateness of the corporate entities of American Suppliers and American Tobacco was not conclusive that picketing of their common premises was secondary rather than primary (R. 30). The case cited and relied upon, *Douds* v. *Metropolitan Federation of Architects*, 75 F. Supp. 672 (S.D. N.Y.), held that picketing of a subcontractor to whom the struck employer subcontracted his work was permissible because he was an ally of the primary employer. To the same effect see *Mills* v. *United Association of Journeymen*, 83 F. Supp. 240 (W.D.Mo.). Common ownership of the stock of two corporations engaged in a straight line operation has been one basis on which the Board has found that the alleged secondary employer is not a neutral but rather an ally of the primary employer. *National Union of Marine Cooks*

and Stewards (Irwin Lyons Lumber Co.), 87 NLRB 54, 56. Compare the reliance of the Kentucky courts on the conveyor belt which conveyed tobacco directly from American Suppliers to American Tobacco (R. 97).

The leading decision of the National Labor Relations Board with respect to situs of picketing states the criteria applied by the Board as follows *(Sailors Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547, 549):

> "When a secondary employer is harboring the *situs* of a dispute between a union and a primary employer, the right of neither the union to picket nor of the secondary employer to be free from picketing can be absolute. The enmeshing of premises and *situs* qualifies both rights. In the kind of situation which exists in this case, we believe that picketing of the premises of the secondary employer is primary if it meets the following conditions: (a) the picketing is strictly limited to times when the *situs* of the dispute is located in the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs*; (c) the picketing is limited to places reasonably close to the location of the *situs*; and (d) the picketing discloses clearly that the dispute is with the primary employer." (Footnotes omitted.)

For various cases applying the foregoing criteria see *Teamsters Union (Associated General Contractors)* 110 NLRB No. 274, 35 LRRM 1369; *Associated Musicians (Gotham Broadcasting Corp.)* 110 NLRB No. 269, 35 LRRM 1370; *Douds* v. *Associated Musicians*, 123 F. Supp. 798, 801-802 (S.D.N.Y.) *Stover Steel Service*, 108 NLRB No. 221, 34 LRRM 1258; *Douds* v. *Business Machine & Office Appliance Union*, 122 F. Supp. 43 (S.D.N.Y.).

b. The extent to which respect for picket lines may be sought of, or accorded by, employees of secondary employers, is governed by the Labor Management Relations Act.

The chief provision in the Labor Management Relations Act designed to limit the area of economic conflict is Section 8(b)(4)(A). Its legislative history discloses that it was designed to proscribe sympathetic strikes and secondary boycotts. *NLRB* v. *Denver Bldg. Trades Council*, 341 U. S. 675, 685-687. Section 8(b)(4)(A) makes it an unfair labor practice for a labor organization or its agents:

> "To engage in, or induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities, or to perform any services, where an object thereof is: (A) forcing or requiring . . . any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person."

This section would have required the National Labor Relations Board to have proceeded against the Teamsters Union for inducing employees of carriers to refuse to handle shipments to and from American Tobacco with the object of causing carriers to cease doing business with American Tobacco, unless such conduct of the Teamsters Union was protected by the proviso to Section 8(b) or was otherwise protected as incidental to a valid primary strike. *NLRB* v. *Denver Bldg. Council*, 341 U. S. 675, 688-689; *Electrical Workers* v. *NLRB*, 341 U. S. 694, 699-705.

The remedy which the Board would afford American Tobacco should it be able to establish that the picketing of its premises was not within the protected activities exempted from Section 8 (b)(4)(A), would be both speedy and effective. For Section 8 (b)(4)(A) proscribes an unfair labor practice deemed so harmful as to require immediate Board recourse to the federal district court for a temporary injunction as soon as a charge is filed and without awaiting any administrative hearing or determination. Section 10(l) of

the amended Act imposes upon the Board the mandatory duty to apply for such injunction.

The Board and the courts have recognized that Section 8(b)(4)(A) is the section by which Congress defined the extent to which neutrals were to be protected from involvement in labor disputes of others. Thus Judge Frank began his consideration of a Board order under Section 8(b)(4)(A), with the statement that (*NLRB* v. *Service Trade Chauffeurs*, 191 F. 2d 65, 67 (C. A. 2)):

> "We have here a problem involving the rights of neutrals in a lawful economic war between an employer and a union. The Taft-Hartley Act does not completely shelter neutrals. * * * Instead the Act recognizes and undertakes to reconcile the competing claims of unions to strike and of bystanders to be free of harm from so-called 'secondary boycotts'."

Under this Section the Board and the courts have developed rules which they would apply in determining whether the conduct of the Teamsters Union constituted the proscribed inducement of employees of the carriers. These rules have been developed both in cases arising from charges filed by neutrals alleging that a union has committed unfair labor practices under Section 8(b)(4)(A) and by employees alleging that their employer has committed unfair labor practices under Section 8(a)(1) and (3). The cases show that these two subsections serve to make each act of peaceful picketing in connection with a strike for a lawful objective either proscribed or protected.

Considering first the cases arising upon charges of unfair labor practices under Section 8(b)(4)(A) as they develop law applicable to the factual issues presented to the Kentucky courts, this Court has held that even when the proviso to Section 8(b) is inapplicable picketing incidental to a primary strike is not prohibited by Section 8(b)(4)(A).

In *NLRB* v. *International Rice Milling Co.*, 341 U. S. 665, 669-671, this Court dealing with picketing by a union

which had not acquired a majority at the picketed mill, held that Section 8(b)(4)(A) did not prohibit the union in the course of its picketing from encouraging "two employees of a neutral customer to turn back from an intended trip to the mill and thus to refuse, in the course of their employment, to transport articles or perform certain services for their employer." This Court held the conduct of the union was permissible even though it had as its object the forcing of the customer to cease handling, transporting or otherwise dealing in the products of the picketed mill. This Court there said (at 671):

> "The picketing was directed at the Kaplan employees and at their employer in a manner traditional in labor disputes. Clearly, that, in itself, was not proscribed by Section 8(b)(4). Insofar as the union's efforts were directed beyond that and toward the employees of anyone other than Kaplan, there is no suggestion that the union sought *concerted* conduct by such employees. Such efforts also fall short of the proscriptions of Section 8(b)(4). . . . A union's inducements or encouragements reaching individual employees of neutral employers only as they happen to approach the picketed place of business generally are not aimed at concerted, as distinguished from individual, conduct by such employees. Generally, therefore, such actions do not come within the proscription of Section 8(b)(4), and they do not here." (Emphasis the Court's.)

And in *NLRB* v. *Denver Building Trades Council*, 341 U. S. 675, 687, this Court summarized its decision in the *International Rice Milling* case as holding that the conduct of "the union pickets near the mill" of an employer from whom the union sought recognition, in seeking "to influence . . . employees of a customer . . . not to cross the picket line," was "no more than was traditional and permissible in a primary strike."

Turning from the cases instituted against unions under Section 8(b)(4)(A), to those instituted by unions under Section 8(a)(1) and (3) discloses the full protection ac-

corded by the federal law to all picketing activities which are not proscribed.

Under the original Wagner Act it was an unfair labor practice for an employer to discharge an employee either for picketing or for refusing to cross a picket line.[8] The Board and the courts have uniformly reached the same result under the amended Act,[9] except in the situation where the refusal to cross the picket line was deemed a violation of the employee's contract of employment.[10]

The leading Board decision under the amended Act is *Cyril de Cordova & Bro.*, 91 NLRB 1121, 1134-1139. The Board held that a stock brokerage firm violated Section 8(a)(1) and (3) of the amended Act when they discharged one of their employees because he refused to enter the New York Stock Exchange to perform duties for the brokerage firm which required his presence on the premises of the Exchange where his refusal was based on the fact that the union of which he was a member was picketing the Exchange as part of a strike conducted by it on behalf of employees of the Exchange for which it was the recognized bargaining representative. The Board held that the refusal to cross the picket line was protected both by Section 7 and

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[8] *Magnolia Petroleum Co.*, 12 LRRM 551 (as in the instant case employees of a neutral employer refused to make or receive deliveries across a picket line established by the union of which they were members); *Cinch Mfg. Co.*, 91 NLRB 371; *Montag Bros., Inc.*, 51 NLRB 366, enforced 140 F. 2d 730 (C. A. 5); *Columbia Pictures, Inc.*, 82 NLRB 568, 71 (another unit of same employer); *Illinois Bell Telephone Co.*, 80 NLRB 1171, set aside 189 F. 2d 124, 127-128, 129 (C. A. 7), certiorari denied, 342 U. S. 885.

[9] *New York Telephone Co.*, 89 NLRB 383; *J. A. Bentley Lumber Co.* v. *NLRB*, 180 F. 2d 641, 642, 643, N. 3 (C. A. 5) enforcing 83 NLRB 803, 816, 824; *Standard Oil Co. of Calif.*, 91 NLRB 783, 787; *Coal Creek Coal Co.*, 97 NLRB 14; *West Coast Casket Co.*, 97 NLRB 820, enforced 205 F. 2d 902 (C. A. 9); *Cyril de Cordova & Bro.*, 91 NLRB 1121, 1134-1139; *Crowley's Milk Co., Inc.*, 102 NLRB 996, 997-998.

[10] *NLRB* v. *Rockaway News*, 345 U. S. 71.

by the proviso to Section 8(b)(4). With respect to the impact of Section 7 the Board said (at 1135):

> "There can be little doubt that Finn's refusal to cross the Stock Exchange picket line, established by his own Union, constituted an act of assistance to that labor organization within the meaning of Section 7.
>
> "Beyond that, Finn's refusal constituted 'concerted activities' for 'mutual aid and protection,' within the scope of that section. Finn had a substantial and legitimate interest in the successful prosecution of the strike against the Exchange, not only because of his union membership, but also because of the possible reciprocal effect improved conditions in neighboring and associated businesses of like kind might have on his own future conditions of employment.[13]
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> "[13] See *NLRB* v. *Peter-Cailler-Kohler Swiss Chocolate Co.*, 130 F. 2d 503, 505; cf. Section 13 of the Norris-LaGuardia Act (47 Stat. 70); *United States* v. *Hutcheson*, 312 U. S. 219."

The Board also pointed to the definition of labor dispute in Section 2(9) of the amended Act, which in this respect retained the broad sweep of the original Act, as showing that the protection of the Act encompassed aid to and concert with employees in another unit of the same or of another employer. In this connection the Board said (at 1135):

> "Nor is it controlling that Finn's activity was in connection with a labor dispute involving employees in another bargaining unit and of another employer. The reach of the Act is not limited to situations involving proximate employer-employee relationships.[14] It is well settled that except where the means used or the objectives sought are otherwise illegal or improper—the Act extends to protect employee activity conducted in furtherance of a labor organization's aims in another
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> "[14] See Section 2(9) of the Act; see also Congressional Reports, National Labor Relations Act, S. 1958, 74th Con., 1st Sess., Senate Report No. 573, p. 7.

unit of the same employer,[15] or even, as here, in a unit of a different employer.[16]

"[15] See e.g., *NLRB* v. *Biles Coleman Lumber Co.*, 98 F. 2d 18 (C. A. 9), enfg., 4 NLRB 679; *Club Troika, Inc.*, 2 NLRB 90, 94; *Montag Bros., Inc.*, 51 NLRB 366; *Pinaud, Incorporated*, supra; *Columbia Pictures*, 82 NLRB 70.

"[16] *Fort Wayne Corrugated Paper Co.* v. *NLRB*, 111 F. 2d 869, 873-874 (C. A. 7); *NLRB* v. *Peter-C-K. Swiss Chocolate Co.*, supra; *NLRB* v. *J. G. Boswell Co.*, 136 F. 2d 585, 596 (C. A. 9)."

The Board rejected the contention that Finn's refusal to cross the picket line was a partial or intermittent work stoppage. It said (at 1136):

"In giving expression to his desire to aid and assist his Union through sympathetic action, Finn utilized a conventional method, time honored in the history of the American labor movement, and one, moreover, that was the only practical means available to him for that purpose.

" * * * Unlike the situation in the 'partial strike' cases referred to above, Finn's refusal to perform part of his work was not a wilfully contrived violation of plant discipline as a means to an end. It was rather a necessary and unavoidable incidental effect of a form of concerted action undertaken in a conventional and traditional manner."

And finally the Board construed the proviso to Section 8 (b) (4) as conferring a positive protection upon the right of an employee to refuse to cross a picket line in the circumstances detailed. The Board stated (at 1137):

"The proviso clearly reflects that Congress recognized the traditional reluctance of employees to cross picket lines, and—under the particular conditions described in the proviso and present also in this case—regarded an employee's refusal to cross a picket line as a form of conduct not unjustifiable from the point of view of public policy. And this is so, no matter how the proviso in its relationship to Section 8(b)(4) is interpreted. If, as has been contended, the proviso is to be interpreted not as qualifying the provision of Section 8(b)(4), but as a general reaffirmation of individual rights, the conclusion that Congress intended

to retain within the protection of the Act conduct such as was engaged in by Finn would appear to follow as a matter of course. If, as it believed, Congress intended the proviso to engraft an exception on 8(b)(4), applicable to union unfair labor practices, the same result would follow. For obviously it would be absurd to say that a union may lawfully induce or encourage employees to refuse to cross a picket line under the circumstances described in the proviso, and yet simultaneously say that employees who refuse to cross are subject to forfeiture of their rights under the Act."

Accordingly, the Board required the stock brokerage firm to reinstate Finn with back pay.

c. The extent to which other persons may be induced to cease doing business with the primary employer is governed by the Labor Management Relations Act.

Section 8(B)(4)(A), which is the only section of the National Labor Relations Act, as amended, which proscribes secondary boycotts, is by its language limited to causing such boycotts by inducing employee action. It bans a union from engaging in, or inducing or encouraging employees to engage in a strike or concerted refusal in the course of their employment to perform services. The National Labor Relations Board and the courts have regarded this limitation as deliberate. Congress intended to protect neutral employers from strikes or employee refusals to perform instructions. But if a union could persuade a neutral employer voluntarily to refrain from dealing with the primary employer, Congress invisioned no harm to the public or neutrals. Thus so long as the interstate common carriers who might otherwise transport goods to and from a struck consignee or shipper acquiesce in a union's request that they respect picket lines, such carriers are not being victimized. Section 8(b)(4)(A) was not designed to protect the primary employer, but solely the innocent neutral who does not desire involvement. If a carrier voluntarily accepts involvement in the primary dispute, it by definition

is not a neutral whom Congress desired to protect: *Rabouin* v. *NLRB.*, 195 F. 2d 906, 911-912 (C.A. 2), enforcing 87 NLRB 972, 980-983; *Elliott* v. *Amalgamated Meat Cutters*, 91 F. Supp. 690, 696, 699 (W.D. Mo. S.W.D.); *Madden* v. *Local 442, Teamsters Union*, 114 F. Supp. 932, 937-938 (W.D. Wis.); *NLRB* v. *Service Trade Chauffeurs*, 191 F. 2d 65, 68 (C.A. 2); *Humphrey* v. *Teamsters Union*, 25 LRRM 2318, 2321 (N.D.N.Y.); *Pittsburgh Plate Glass Co.*, 105 NLRB 740; *Kitty Clover, Inc.*, 103 NLRB 1665; *Crowley's Milk Co., Inc.*, 102 NLRB 996; *Local Union 878, Teamsters (Arkansas Express, Inc.)*, 92 NLRB 255; *Lumber and Sawmill Workers (Santa Ana Lumber Co.)*, 87 NLRB 937.

In *Rabouin* v. *NLRB*, 195 F. 2d 906 (C. A. 2) it appeared that the Teamsters Union had created a situation in which interstate carriers by motor vehicle were refusing to handle Rabouin's goods. The Teamsters Union had not induced employees of the carriers to strike or to refuse to handle Rabouin's goods, or to threaten such conduct but had achieved the carrier boycott of Robouin solely by requests directed to management or supervisory employees of the carriers.

In agreeing with the Board that the Teamsters Union had not violated Section 8(b) (4)(A) the court said (at 911-912):

> "The embargo on Rabouin's goods was the product solely of requests addressed to management or supervisory personnel. The former are clearly employers, and the latter have lately been so defined by the new § 2 (2, 11), 29 U. S. C. A. § 152 (2, 11). The union thus did not 'encourage the employees.'
>
> "The union cannot have committed an unfair labor practice under this section in regard to those employers who refused to handle Rabouin's shipments under the terms of the area agreement provision relating to cargo shipped by struck employers. Consent in advance to honor a hot cargo clause is not the product of the union's 'forcing or requiring any employer * * * to cease doing business with any other person.' § 8(b)(4)(A)."

Similarly in *Madden* v. *Local 442, Teamsters Union,* 114 F. Supp. 932, 937 (W. D. Wis), the court refused to issue a temporary injunction for which the National Labor Relations Board applied under Section 10 (l) of the Act, where it appeared the carrier's boycott of the charging party's goods was achieved by the Teamsters Union without coercion of the carriers. The court said (at 937):

> "The employer under the terms of the Taft-Hartley Act may discard his neutrality in industrial disputes involving other employers."

In *Humphrey* v. *Teamsters Union,* 25 LRRM 2318 (N. D. N. Y.) the court said (at 2321):

> "It seems to be undisputed * * * that a secondary boycott induced by demands or threats addressed only to management or its representatives is not proscribed under the Act."

d. The validity of collective bargaining contracts permitting respect for picket lines and non-handling of unfair goods is governed by the Labor Management Relations Act.

Since Section 8(b) (4)(A) does not bar union appeals to other employers to cease doing business with the primary employer, it is not unlawful for unions to include in their collective bargaining contracts clauses providing that employees may refuse to cross picket lines or refuse to handle unfair goods. The effect of such a clause is to exclude from the duties imposed on the employee by his job any duty to cross a picket line or handle unfair goods. Indeed, the very same contract which the Kentucky courts held illegal was recently held valid by the United States District Court for the Western District of Wisconsin in a case arising under the Labor Management Relations Act, *Madden* v. *Local 442, Teamsters Union,* 114 F. Supp. 932 (W. D. Wis). There the Central States Area Agreement which appears in the reported decision (at 934-936) is the

same contract here involved (R. 21-22). There the District Court held that the refusal of members of Local 442 of the Teamsters Union who were employed by common carriers to handle goods shipped to or from a picket bound plant of a consignee or shipper was lawful under the Labor Management Relations Act because this was a valid collective bargaining contract. The court said (at 937-938):

> "Inasmuch as their employers had by contract consented to the 'unfair goods' provision of the contract, the failure of the employee to handle Wisco shipments was not a strike or concerted refusal to handle Wisco products in the course of their employment, within the meaning of Section 8(b)(4)(A), for that employment defined by the contracts excluded from their required duties work on 'unfair goods.' Causing the employees to exercise their contractual privilege, was not an 'inducement' to a concerted refusal of the employees to handle Wisco freight in violation of Section 8(b)(4)(A)."

The National Labor Relations Board also held the identical clause valid in *Pittsburgh Plate Glass Co.*, 105 NLRB 740; cf. *McAllister Transfer, Inc.*, 110 NLRB No. 224, 35 LRRM 1281 December 16, 1954.

For other cases in which the Board and the courts have held similar provisions in collective bargaining contracts valid see *Rabouin* v. *NLRB*, 195 F. 2d 906, 912 (C. A. 2), enforcing 87 NLRB 972, 982-983; *Teamsters Union (Arkansas Express)*, 92 NLRB 255; *NLRB* v. *Lodge* 850, *A. F. of L. Machinists and Local 880, A. F. of L.*, U. S. D.C.E.D. Mich., October 16, 1954; *Meier & Pohlmann Furniture Co.* v. *Gibbons*, U. S. D.C.E.D. Mo. E. D., January 10, 1955; cf. *Overtone* v. *Teamsters Union*, 115 F. Supp. 764, 770 (W. D. Mich.).

And this Court stated flatly that the proviso to Section 8 (b) (4) "clearly enables contracting parties to embody in a contract a provision against requiring an employee to cross a picket line if they so agree." *NLRB* v. *Rockaway News*, 345 U. S. 71, 80, 81.

2. The Labor Management Relations Act does not permit any exceptions from its generally applicable rules of labor relations to be made on account of state laws with respect to the duties of a common carrier.

One of the issues to which Congress gave consideration when it considered the Taft-Hartley Act was whether any exceptions from generally applicable labor law should be made in favor of any of the industries of such critical importance to the public that strikes or other labor disputes therein cause unusual public hardship. Congress deliberately decided not to make any exceptions, other than those listed in Section 2 (2) of the Act which excludes from the term "employer" only the United States Government, federal reserve banks, state governments, non-profit hospitals and persons subject to the Railway Labor Act and Section 2 (3) which excludes from the term "employee" only agricultural workers, domestic servants, independent contractors and supervisors.

Speaking of the proposals to prohibit strikes or work stoppages in industries of critical public importance, Senator Taft stated (93 *Cong. Rec.* 3835, 2 Leg. His. L.M.R.A. 1006).

> "If we begin with public utilities, it will be said that coal and steel are just as important as public utilities. I do not know where we could draw the line. So far as the bill is concerned, we have proceeded in the theory that there is a right to strike * * *."

The right to strike was thus preserved to all employees within the jurisdiction of the Act with the concomittant right to observe the picket lines of other strikers. For mutual respect for picket lines is, as Congress recognized, a basic ingredient of the right to strike. Only employees who are free to respect the picket lines of others have the right to strike for unless they can accord such picket line respect to others they cannot expect the reciprocal respect

for theirs should they strike. Unless employees can count on respect for their own picket lines their right to strike is virtually meaningless for a strike without effective picketing is hopelessly crippled from the start.

Congress made all the provisions of the amended Act applicable to every industry within the jurisdiction of the Act without exception. It was aware that the original National Labor Relations Board had uniformly applied the original Act to common and contract carriers by motor vehicle.

Not only did Congress fail to write into the Act any exceptions for common and contract carriers by motor vehicle, it expressly excluded the National Labor Relations Board from ceding to the states jurisdiction over "transportation" industry except when local in character, even where the state has the same substantive labor law provisions as are contained in the amended Act. Section 10 (a) of the amended Act permits such cession in all industries except those specifically enumerated. Transportation except when local in character, is specifically enumerated as an excluded industry. Since most transportation—all by rail or air—is covered by the Railway Labor Act, Congress must have had the common and contract carriers by motor vehicle specifically in mind when it manifested this intent to have their labor relations policy administered solely by federal agencies even where state agencies were administering the same substantive labor law.

Indeed, the Congressional intention to preempt labor relations in the transportation industry is further manifest by its listing as one of those industries to which the national emergency provisions of Sections 206 and 208 of the Labor Management Relations Act are applicable.

Accordingly, the National Labor Relations Board has, without exception, where interstate commerce is affected within the meaning of the Act, applied the various provisions of the Act to common and contract carriers with no less diligence and with no less effect than it has applied

such provisions to employers and employees in other industries.[11] It was in cases dealing with common carriers that the Board rejected the argument that contract clauses such, as the ones involved here are contrary to the policy of the Act. Indeed, all the cases we have discussed where clauses permitting respect for picket lines were held valid involved common carriers (see pp. 36-37, *supra*).

In only one of these, the *McAllister* case, 110 NLRB No. 224, 35 LRRM 1281 (December 16, 1954), was the Board presented with arguments that the duties of the common carriers to serve all comers barred respect for picket lines at the places of business of shippers or consignees. The Board properly deemed this an improper basis for reading exceptions into the generally applicable provisions of the Act governing the rights of employees to observe picket lines.

Earlier the Board had held that an employer could not discharge an employee because by his picketing he caused common carrier railroad trains to back away from the plant without making deliveries. The Board held that picketing railroad tracks was no different from any other picketing as far as the Act was concerned. *Standard Oil Co. of California*, 91 NLRB 783, 786-787.

Similarly, in *Globe Wireless, Ltd.* 88 NLRB 1262, 1265, 1266, enforced 193 F. 2d 748 (C. A. 9), the Board and the court rejected the contention that the employees, who engaged in a strike to protest the discharge of one employee, acted illegally because they interfered with the employer's obligations as a common carrier by radio under the Federal Communications Act. (47 U. S. C. 201, 214, 501). This Act

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[11] Representation proceedings: *Luper Transportation Co.*, 92 NLRB 1178; *Eldon Miller, Inc.*, 107 NLRB No. 117. Unfair labor practices; *Deluxe Motor Stages*, 93 NLRB 1425; *Direct Transit Lines, Inc.*, 92 NLRB 1715; *Ray Stone Transfer Corp.*, 99 NLRB 662; *Stibbs Transportation Lines*, 98 NLRB 422; *Malone Freight Lines*, 106 NLRB No. 176. See also Sixteenth Annual Report of the National Labor Relations Board (1951) page 25 and the Seventeenth Annual Report (1952) page 12.

makes it the duty of such carriers to serve all without discrimination and not to abandon service. Interference therewith is criminal. It was argued that under *Southern Steamship Co.* v. *NLRB*, 316 U. S. 31, the conduct of the employees in striking disqualified them for reinstatement equally with strikes of seamen deemed mutinous. In enforcing the Board's order requiring reinstatement of the strikers, the United States Court of Appeals for the Ninth Circuit stated (at 751):

> "A sufficient answer to the argument predicated on the Southern Steamship decision is that the Communications Act does not confer upon licensees thereunder the right to conscript labor, nor does it expressly or by reasonable implication undertake to restrict the right of employees to strike or quit their jobs, either singly or in concert. On the other side of the picture the right of employees to strike or to engage in concerted activities for their mutual aid and protection is expressly recognized in the National Labor Relations Act, 29 U. S. C. § 151 et seq. *International Union of Automobile Workers* v. *O'Brien*, 339 U. S. 454, 70 S. Ct., 781, 94 L. Ed. 978. It seems purely fanciful to assume, as does respondent, that the failure of a licensee to perform the obligations prescribed by the Communications Act would constitute a breach of such obligations on the licensee's part in instances where the failure is caused by an economic strike."

In *Overton* v. *Teamsters Union*, 115 F. Supp., 764, 769, 772 (W.D. Mich. S.D.), the United States District Court for the Western District of Michigan Southern District held that if there were any conflict between the Labor Management Relations Act and the law respecting the duties of common carriers the Labor Management Relations Act took precedence (at 772). Accordingly, it vacated an injunction issued by the Michigan state courts, which like the Kentucky injunction here involved, compelled members of the Teamsters Union who were employed by common carriers to deliver goods to and from the picket bound plant of a consignee or shipper although their employment was gov-

erned by collective bargaining contracts with carriers which expressly permitted respect for picket lines. The Michigan courts like the Kentucky courts here, based their injunction on the theory that common carriers had a duty to serve all customers which was superior to the right of its employees to respect picket lines. The District Court held that the Labor Management Relations Act preempted the field and precluded the Michigan courts from issuing the injunction. The District Court (at 770) also suggested that the injunction issued by the Michigan courts was probably in conflict with federal law because it interfered with the rights of the common carriers employees under contracts of a kind which had been held valid by the National Labor Relations Board, citing the *Rabouin* case 87 NLRB 792 and the *Pittsburgh Plate Glass Co.* case, 105 NLRB No. 120, discussed p. 37, *supra*. The District court further suggested that the conduct of the plaintiff in that case, a would-be shipper or consignee whose plant was being picketed by the Upholsters Union, not a defendant in the suit, in securing the state court injunction, interfered with the rights of employees in violating Sections 7 and 8(a)(1) of the National Labor Relations Act, and hence was in itself an unfair labor practice (at 769-770).

See also *Meier & Pohlmann Furniture Co.* v. *Gibbons*, (U. S. D.C.E.D. Mo. E. D., January 10, 1955) where the picket bound employer sued both common carriers and unions for damages under Section 302 of the Labor Management Relations Act which confers jurisdiction on courts to award damages for secondary boycotts which are there defined in the language used in Section 8(b)(4)(A). Damages were also sought under Section 316(b) of the Interstate Commerce Act which forbids unjust discrimination. The court denied damages under each provision, holding that the picket line clauses of the collective bargaining agreements were valid under the Labor Management Relations Act and provided a complete defense.

In three cases arising under the Norris-La Guardia Act

the federal courts rejected contentions that there was anything in the law respecting the duties of common carriers which necessitated reading any exceptions in favor thereof into that Act. In two of the cases, the common carriers had collective bargaining contracts with unions exempting their employees from any duty to cross picket lines. In the first of the cases the District Court had held the contract invalid as in conflict with the duties of a common carrier. On appeal the United States Court of Appeals for the Tenth Circuit reversed the injunction, which in disregard of the collective bargaining contract required employees to cross picket lines. *Lee Way Motor Freight, Inc.* v. *Keystone Freight Lines*, 1267 F. 2d 931, 933 (C. A. 10), certiorari denied 317 U. S. 645.

The latter case was followed and cited with approval in *East Texas Motor Freight Lines* v. *Teamsters Union*, 163 F. 2d 10 (C. A. 5). In affirming the refusal of the District Court to issue an injunction against a carrier and a union which were refusing to interline freight with the plaintiff because of a labor dispute between the union and the plaintiff, the court of Appeals stated (at 12):

> "Appellant is here insisting that the injunction was wrongly denied . . . since what was done was in violation of another congressional act, the Motor Carriers Act. . . .
>
> "We cannot agree . . . we are in no doubt that the case is wholly unlike those dealt with in *Allen Bradley Co.* v. *Union*, 325 U. S. 707. . . . Neither are we in any doubt that (since it is one so arising) plaintiff, not having complied or attempted to comply, with the Norris-La Guardia Act is in effect seeking to enlarge the jurisdiction of the federal courts as limited by that act by its claim that the court should issue the injunction because the acts complained of are violations of duties or obligations arising under the Interstate Commerce Act, 49 U. S. C. A. § 1 et seq. *Lee Way Motor Freight, Inc.* v. *Keystone Freight Lines*, 10 Cir., 126 F. 2d 931, a case directly in point, so decides, and we are in no doubt that it was well decided. The order appealed from is affirmed."

In *Southeastern Motor Carriers* v. *Hoover Truck Co.*, 34 F. Supp. 390 (D. C., Tenn.), the District Court pointed out that the effect of the injunction sought would be to invalidate clauses in collective bargaining agreements which permitted employees of the carriers to refuse to cross picket lines or handle unfair goods. It placed its denial of the injunction on the ground that there was nothing in the duties of employees of a common carrier which operated to suspend the Norris-LaGuardia Act. The court said (at 392):

> "The Norris-La Guardia Act, Title 29, U. S. C. A. § 101 et seq., does not carry any exception in favor of the Motor Carrier Act, Title 49 U. S. C. A. § 301 et seq. and this act does not suspend the Norris-La Guardia Act, nor does it vest this court with jurisdiction to issue injunctions in violation of the terms and provision of the Norris-La Guardia Act."

Because the Norris-La Guardia Act, like the National Labor Relations Act, is concerned with defining the permissible area of economic conflict, we submit there exists no more reason for narrowing that area by some assumed concern for common carrier duties in one Act than in the other. Hence the foregoing decisions under the Norris-La Guardia Act should be equally authoritative for the National Labor Relations Act, as amended.

Indeed, were the Board under the doctrine of *NLRB* v. *Southern Steamship*, 316 U. S. 31, 46-48, required to apply the National Labor Relations Act so as to give full effect to any duties which might be imposed on employees of common carriers because of the special calling in which their employers are engaged, the result here would be no different: First, because federal law governs that calling and it is for the federal administrative agencies created under the Interstate Commerce Act to apply the law requiring those special duties, if any, rather than state courts; and second, because the federal law imposes on carriers no duties infringed by collective bargaining agreements pro-

viding for respect of picket lines. The applicable decisions of the Interstate Commerce Commission and the courts under the Interstate Commerce Act establishing both pre-emption by federal law and the validity of a carrier's policy of permitting its employees to respect picket lines, are collected and discussed in Point II, pp. 73, 80-82, 85-87, *infra*.

No plausible reason suggests itself for permitting the state of Kentucky to read into the National Labor Relations Act, as amended, exceptions in favor of state imposed duties of common carriers. This Court has refused to allow the State of Wisconsin to create an exception to the national labor policy in a case involving the possibility of great local distress. *Bus Employees* v. *Wisconsin Board*, 340 U. S. 383. In striking down the Wisconsin statute depriving employees of public utilities of their right to strike, this Court said (at 391):

> "Second. The Wisconsin court sought to distinguish *United Auto Workers* v. *O'Brien*, supra, on the ground that the industry to which Michigan applied its notice and strike-vote provisions was a national manufacturing organization rather than a local public utility. Congress drew no such distinction but, instead, saw fit to regulate labor relations to the full extent of its constitutional power under the commerce clause, *Labor Board* v. *Fainblatt*, 306 U. S. 601, 607 (1939). • • • No distinction between public utilities and national manufacturing organizations has been drawn in the administration of the federal act • • • Creation of a special classification for public utilities is for Congress, not for this court."

Surely the obligation of a public utility to furnish either transportation, light, or power uninterruptedly to the entire community is at least of equal rank with the obligation of a common carrier to transport freight to a particular consignee.

The effect upon a community of an interruption in service furnished by a public utility would certainly be more

disruptive of the welfare of the community than the refusal of employees of a common carrier to make a direct delivery to a strike-bound plant.

Respondent in its Response to the Petition for Writ of Certiorari seems to place special emphasis on the fact that the injunction does not prohibit the employees of common or contract carriers from engaging in a strike against their employer, but only from refusing to serve one customer while serving all others. We fail to see how such attempted distinction has any validity. It could just as well have been argued in *Bus Employees* v. *Wisconsin Board*, 340 U. S. 383, that public utility employees could not strike a branch power house serving one part of the community unless they strike the main power house and all other branches as well.

3. The injunction issued by the Kentucky courts fell within the area regulated by the Labor Management Relations Act.

From the foregoing description of the detailed and complete regulation of picketing and related activities of just such employees as those here involved, in which the National Labor Relations Board and the federal courts are daily engaged, it is apparent that the Kentucky courts have issued an injunction within the field of federal regulation. The decision which the Kentucky courts made with respect to whether American Tobacco was an ally of American Suppliers or a neutral (R. 30-31, 96-98), involves an issue regularly decided by the Board and the courts (see cases cited, pp. 26-27, *supra*). The same is true of the issues with respect to whether picketing of American Tobacco was primary or secondary (cf. R. 28-30, 95-96, 99 with cases cited, pp. 27-31, *supra*); and whether the collective bargaining contracts between the carriers and the Teamsters Union permitting employees to respect picket lines and to refrain from handling unfair goods was valid (cf. R. 102-103 with cases cited, pp. 36-37, *supra*).

In addition to these issues the Board would also have inquired as to whether Local 89 was directing its inducement not to handle unfair goods to the carriers and their managerial or supervisory employees or was achieving carrier cooperation only by inducing concerted work stoppages or threats thereof by its employees (see cases cited, pp. 34-36, *supra*).

And finally the Board would have considered whether the refusal to cross the picket line was within the protection of the proviso to Section 8(b) of the Act, as amended, namely, was it a refusal to enter the premises of an employer whose employees were conducting a strike approved or ratified by a union which was the duly authorized bargaining agent of the striking employees (see cases cited, pp. 31-33, 37, *supra*).

The latter two questions seem to have received no consideration by the Kentucky court, although under federal law they might have been determinative of whether Local 89's conduct would have been protected by the National Labor Relations Board or would have been prohibited.

We believe there can be no doubt that the Kentucky courts' decision operated in a field regulated by the Labor Management Relations Act.

4. The Kentucky courts were without jurisdiction to issue an injunction which invaded the field regulated by the Labor Management Relations Act.

Once it appears that the Kentucky courts have issued an injunction which regulates the same conduct as is governed by the Labor Management Relations Act, it is clear that the injunction is to that extent beyond the powers of Kentucky. For it is established beyond question that the Labor Management Relations Act preempts so much of labor law as it regulates. *Bethlehem Steel Co.* v. *New York Labor Board*, 330 U. S. 767; *La Crosse Telephone Corp.* v. *Wisconsin Board*, 336 U. S. 18; *Wisconsin Board* v. *Plankinton*, 338 U. S. 953; *International Union* v. *O'Brien*, 339 U. S.

454; *Bus Employees* v. *Wisconsin Board*, 340 U. S. 383; *Garner* v. *Teamsters*, 346 U. S. 485; *Building Trades* v. *Kinard*, 346 U. S. 933.

The situation in the instant case clearly falls within the rule. Local 89 had been certified by the National Labor Relations Board as the exclusive bargaining representative of the employees of American before they went out on strike to enforce bargaining demands after a stalemate was reached. As an incident to this strike, picket lines were established around the struck premises. Truck drivers employed by interstate common, contract or private carriers refused to make deliveries to or pick-ups from the struck premises because of the picketline.

Although the state was without jurisdiction to interfere with either the strike or the picket line in any manner (absent violence, breaches of the peace or other unlawful means falling within the ordinary police powers of the states) it did, by injunctive process, compel members of the same union who were employed by common carriers to cross the picket line established by their striking co-members. This action by the state court was based on a complaint which alleged that Local 89 and its members were engaged in an unlawful secondary boycott (R. 4-7). If these allegations of the complaint were true, Local 89 would have been engaged in conduct falling within the proscription of the National Labor Relations Act. (See cases cited p. 28, *supra*).

Thus, on the face of the complaint, then, here, as in the *Garner* case, the respondent could have presented its grievance to the National Labor Relations Board; here, as in the *Garner* case, the duty of primary decision lay with the Board and the grievance was not subject to litigation in the tribunals of the State. 346 U. S. 485 at 501.

That the state court subsequently found the picketing to be primary, and hence lawful, while other conduct was found to be unlawful is, under the law, immaterial. Since the state court had no jurisdiction to proceed in the first

instance, the proceedings should have been dismissed at the threshold and were, therefore a nullity. *Garner* v. *Teamsters*, 346 U. S. 485; *Building Trades Council* v. *Kinard*, 346 U. S. 933; *Capital Service, Inc.* v. *NLRB*, 347 U. S. 501; *WERB* v. *Plankinton*, 338 U. S. 953. It is not the ultimate decision which controls but the nature of the allegation of the complaint and the relief requested.

This case fulfills the prediction of the Court in the *Garner* case, that "a multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudication as are different rules of substantive law." 346 U. S. 485, 491.

Accordingly, regardless of the ultimate basis for the state court decision, and regardless of whether the Board might have reached the same result, since the Kentucky courts have intruded into the domain of labor-management relations which are the subject of federal legislation, the judgment is void under the provisions of Article I, Section 8, and Article VI of the federal constitution.

B. The injunction issued by the Kentucky courts conflicts with provisions of the Labor Management Relations Act.

Until the National Labor Relations Board and the federal courts have had an opportunity to consider the case it is, of course, impossible to know how they would have resolved the controverted issues of fact and law considered by the Kentucky courts. Nevertheless it is clear that if the Board had determined as the Kentucky courts did, that American Suppliers and American Tobacco were so enmeshed both geographically and financially as to be one employer (R. 30-31, 96-99), then the Board would likewise, as the Kentucky courts did, have regarded the picketing of the joint premises of American Suppliers and American Tobacco as primary picketing (R. 29-31, 95-99). Once it is determined that the situs of American Tobacco was primary in character then the restraints placed by the Kentucky courts upon members of Local 89 crossing the picket line conflict

with rights guaranteed by the National Labor Relations Act.

1. The injunction limits the collective bargaining power accorded to Local 89 and its members by the National Labor Relations Act, as amended.

The right to bargain collectively is the essence of the rights protected by the National Labor Relations Act. This right is dependent upon the right to strike (see p. 22, *supra*). But the right to strike involves more than a mere withdrawal of labor power. It carries with it the right to engage in those traditional incidents of a strike which are essential to its success. Of these, one of the most important is the right to picket. But this, too, is a meaningless gesture unless other employees are protected in the right to refrain from crossing picket lines. In the words of this Court, it is "traditional and permissible in a primary strike" for pickets at an industrial plant "to influence employees of a customer of the (picketed employer) not to cross the picket line." *NLRB* v. *Denver Building Trades Council*, 341 U. S. 675, 687.

The response of the customer's employees, particularly when they are members of labor organizations, to such an appeal for assistance is equally traditional. As the Court of Appeals for the Ninth Circuit has stated (*Printing Specialties Union* v. *NLRB*, 171 F. 2d 331, 334, certiorari dismissed, 336 U. S. 949):

> "The reluctance of workers to cross a picket line is notorious. To them the presence of the line implies a promise that if they respond by refusing to cross it, the workers making the appeal will in turn cooperate if need arises. The converse, likewise, is explicit. 'Respect our picket line and we will respect yours'."

So crucial to the success of a strike is the ability to picket and to respect the picket line, that an injunction which compels the crossing of a picket line, limits the right to strike, and hence the collective bargaining power of those

enjoined. As Judge Frank pointed out in *NLRB* v. *Service Trade Chauffeurs*, 191 F. 2d 65, 67-68 (C. A. 2):

> "The Taft-Hartley Act does not completely shelter neutrals—in this case, so-called, 'secondary employers.' If it did, strikes would often be hopelessly crippled."

Numerous economic authorities attest to the importance of picketing to bargaining power. Thus Orme W. Phelps, Introduction to Labor Economics (1950), page 485, states:

> "Picketing is the key to strike success. If the picketing is effective, the odds are that the strike will be won. If the picketing is unsuccessful, it is a good bet that the strike will be lost."

W. S. Hopkins, Labor in the American Economy (1948), page 207, states:

> "In order to keep the jobs open while the work is stopped, it becomes almost inevitable that the strikers inform both the public and potential takers of the jobs that a strike is in progress. This is why picketing is an integral part of virtually every strike. . . . Its primary purpose, of course, is to persuade other people not to enter the establishment as 'strikebreakers'."

Gordon S. Watkins, Labor Problems (1942), page 605, states:

> "Picketing involves the presence of striking workers or their union brothers who pace back and forth before the place of business of an employer considered 'unfair to organized labor,' in the hope of being able to persuade peacefully other workers not to work in the establishment, and customers not to do business there."

Neil W. Chamberlain, Collective Bargaining (1951), page 224, states:

> "In conjunction with a strike, the picket line demonstrates conclusively the existence of a labor 'movement' —a bond among unions— by the respect which it is accorded, by the refusal of members of other unions to cross it whether engaged in their personal or their employer's business. The picket line has acquired an

> almost religious significance to many union members, so that its violation takes on aspects of sacrilege and taints the offender."

In the instant case the injunction below severely curtailed the collective bargaining power of Local 89. Just how severe the curtailment is not clear from the record but that it was serious is obvious. The unit at American Suppliers for which Local 89 was certified by the National Labor Relations Board contained truck drivers (see unit description quoted footnote 4, p. 4, *supra*). Since American Tobacco normally got all of its tobacco from American Suppliers prior to the strike but claimed that after the strike began it got none from that source, it seems apparent that shipments in by common carrier to American Tobacco might well involve members of Local 89 in essentially strike breaking, i.e., hauling tobacco into American Tobacco which but for the strike would have been hauled in by truckdriver employees of American Suppliers on strike. Thus, the decree below, construed at its worst, may have compelled members of Local 89 to serve as strikebreakers, performing in effect the work of striking truck drivers also members of Local 89. The National Labor Relations Board and the courts have always held that an employee is protected against being compelled to serve as a strikebreaker. *Rapid Roller Co.* v. *NLRB*, 120 F. 2d 452, 460-461 (C. A. 7) certiorari denied, 317 U. S. 650; *United Biscuit Co.*, 38 NLRB 778, modified and enforced 128 F. 2d 771 (C. A. 7); *Pinaud, Incorporated*, 51 NLRB 235, 236; *Gardner-Denver Co.*, 58 NLRB 81.

It is obvious that if the effect of the injunction below was to compel members of Local 89 to act as strikebreakers it seriously curtailed the bargaining power of Local 89. In this respect it conflicted with the right to strike in the same manner as the Michigan anti-strike and the Wisconsin public utility statutes held unconstitutional as in conflict with the National Labor Relations Act, as amended, in

Auto Workers v. *O'Brien*, 339 U. S. 454, and *Bus Drivers* v. *Wisconsin Board*, 340 U. S. 383.

But the conflict is only less in degree and not in kind if the effect of the injunction was merely to require the delivery of goods to and from the premises of American Tobacco which would have been handled by common carriers even if there was no strike on the premises. For Congress intended that the power of a union to bargain collectively have behind it the power to conduct a strike accompanied by picketing which all employees may respect by not entering the premises on strike, regardless the type of duties which they may be asked to cross the picket line to perform. The proviso to Section 8(b) discussed on page 25, *supra*, manifests Congressional intent to encompass within the power of the union the right to back its collective bargaining demands by a strike which can properly use picketing which employees of customers of the struck premises may respect by refusing to cross the picket lines.

This is a valuable aspect of the right to strike. The inability of a struck employer to receive its usual delivery or pickup service may inflict such economic loss as to make it willing to accede to demands of the union to which it would never exceed but for this power of the union.

Not only was Local 89's bargaining power vis-a-vis American Suppliers drastically reduced by compelling members of Local 89 who were employed by the common carriers to cross the picket line, but the bargaining power of members of Local 89 who were employed by the common carriers was similarly reduced. Their inability to respect the picket line of their own Local weakened the Local. But more than that the competition of the lower rates or poorer conditions which the truck drivers employed by American Suppliers could compel would weaken their own position. And still further, the inability of members of Local 89 employed by common carriers to respect picket lines threatened them with a similar disrespect for their picket lines should they ever conduct a strike.

Finally, the injunction below forbade Local 89 from entering into any arrangement with any common carrier which would result in the common carrier failing to serve American Tobacco. Under the National Labor Relations Act, as amended, Local 89 and its members are protected in their right to appeal to employers and their supervisory and managerial employees not to do business with a struck employer (see cases discussed, pp. 34-36, *supra*). Here again the injunction drastically curtailed the economic power of Local 89 to bargain collectively with American Suppliers.

2. The injunction issued by the Kentucky courts deprives employees of rights guaranteed by Section 7 of the National Labor Relations Act, as amended.

The right of members of Local 89 both to refrain from, and to induce others to refrain from, crossing the picket line established by Local 89 as the federally certified union at American Suppliers, is guaranteed by the National Labor Relations Act, as amended. This is so not only by virtue of the fact that such conduct constitutes assistance to the union and also other concerted activities for mutual aid and protection within the meaning of Section 7 of the Act, as amended (see cases cited, pp. 20, 31-32, *supra*). But it is also true because the proviso to Section 8(b) provides that none of the conduct removed from the protection of Section 7 shall result in excepting from that protection the right of every employee to refrain from entering on the premises of an employer against whom an authorized bargaining representative is conducting a strike (see cases cited, pp. 33, 36, *supra*).

Here the injunction issued by the Kentucky courts compels members of Local 89 against their wishes to enter upon the premises where Local 89 as the union certified by the National Labor Relations Board is conducting a strike. Hence the state order deprives members of Local 89 of rights guaranteed by federal law. The conflict here is even more clear and direct than that arising from the Florida

statute requiring business agents of unions to be licensed. But the latter conflict was deemed a sufficient basis upon which to declare the Florida statute unconstitutional. *Hill* v. *Florida*, 325 U. S. 538, 541-542.

Indeed the effect of the injunction below, is to deprive each employee of the carriers of his right to refuse to cross a picket line when he is on his own time and to permit his discharge for such refusal. Since by the terms of their employment, members of Local 89 employed by carriers were not required as part of their duties to cross picket lines, whenever they refused they were properly acting on their own time and outside the scope of their employment. Cf. *Pittsburgh Plate Glass Co.*, 105 NLRB 740, 744, and *Madden* v. *Local 442, Teamsters Union*, 114 F. Supp. 932, 938 (W. D. Wis.) holding that collective bargaining clauses exempting handling of unfair goods constitute a definition of job to exclude such duties. Since this type of work is outside the scope of employment, the employees have no duty to perform it, and hence their refusal cannot be considered subordination, nor a strike in whole or in part, nor an activity for which they could be discharged, nor a refusal to work while on working time.

This is an activity similar in effect to activities engaged in during non-working hours,[12] and "an employee is of

[12] Section 7 protects concerted activities engaged in during non-working hours because their purpose is "mutual aid or protection," *e.g.*, appearance of employee representatives before a legislative committee (*Bethlehem Shipbuilding Corp.* v. *NLRB*, 114 F. 2d 930 (C. A. 1)); consultation during lunch hour over discharge of fellow employees *Ozark Hardwood Co.*, 91 NLRB 1443, enforced 194 F. 2d 963 (C. A. 8); discussions with fellow employees relating to the need for union organization (*Root-Carlin*, 92 NLRB 1313); planning a dinner meeting to discuss demands to be made on the employer (*Coca-Cola Bottling Co.*, 97 NLRB 151); circulating a petition designating the circulator as agent to collect back pay owing (*Salt River Valley Water Users Assoc.*, 99 NLRB 849); union meeting (*Kelco Corp.*, 79 NLRB 759, reversed on other grounds, 178 F. 2d 578 (C. A. 4). The Board has also held that union business customarily done during the non-business hours must be done at that time or lose its protection (*Gulf Coast Oil Co.*, 97 NLRB 1513).

course free to exercise his right to refuse to cross a picket line when he is on his own time, and his discharge for so doing would doubtless be a violation of Section 8(a)(1)." *NLRB* v. *Rockaway News*, 197 F. 2d 111, 113 (C. A. 2).

But the injunction below has the effect of compelling carriers to discharge employees for refusing to cross the picket line and prohibits Local 89 from interfering with such discharges. In the contempt proceedings it appeared such a discharge had in fact occurred and Local 89 had felt compelled not to interfere (R. 19-20).

So direct is the interference of the Kentucky court in the rights of employees protected by Section 7 of the National Labor Relations Act, as amended, that the conduct of American Tobacco in securing the injunction may have constituted an unfair labor practice under Section 8(a)(1). In dissolving a similar state court injunction the District Court in *Overton* v. *Teamsters Union*, 115 F. Supp. 764, 770 (W. D. Mich. S. D.) said:

> "The practical effect of this injunction is to compel the employees of the defendant common carriers, who are members of the defendant Teamsters' Unions, to cross the picket lines established at the plaintiff's factory by the members of the Upholsterers' Union, which is not a defendant in this case.
>
> "Therefore, under the decision of the National Labor Relations Board in the Carter case, from which I quoted, it might be argued with some force that the act of the plaintiff company in obtaining the State-court injunction would constitute an unfair labor practice by such employer under Sec. 8(a) of the Act, in that it interferes with the rights of the members of the Upholsterers' Union under Sec. 7 of the Act."

In *Carter & Bro.*, 90 NLRB 2020, 2026, to which the court referred in the above quotation, the National Labor Relations Board held that an employer committed an unfair labor practice within the meaning of Section 8(a)(1) of the National Labor Relations Act by obtaining an injunction from a Texas state court which deprived employees of rights

guaranteed to them by the National Labor Relations Act. The Board said (at 2026):

> "In addition, a direct consequence of the Respondents' unfair labor practices was the issuance at the Respondents' request of a still outstanding injunction which, in effect, prohibits any union meeting on the Respondents' property except with the Respondents' consent. In view of the serious consequences that flow from violation of a court order, this injunction continues to represent a correspondingly serious impediment to the free exercise of rights guaranteed under the Act, as herein found. We shall, therefore, in order to cure the effects of the Respondents' unfair labor practices in this connection, and in order to effectuate the policies of the Act, order the Respondents to request the court to vacate the injunction, or to appropriately modify the injunction in conformance with our Decision and Order herein." (Footnotes Omitted.)

3. The injunction renders invalid provisions in collective bargaining contracts between Local 89 and common carriers which are valid under the National Labor Relations Act, as amended.

Highly significant, and demonstrative of the degree of conflict between Kentucky law and the Federal law, is the action of the Kentucky courts in casting out, as a nullity, a contract provision between Local 89 and the common carriers which reads as follows (R. 21):

> "It shall not be considered a violation of this Agreement for employees covered hereunder to refuse to cross a picket line of a Union or refuse to handle unfair goods. The term unfair goods, as used in this section includes, but is not limited to, any goods or equipment transported, interchanged, handled, or used by any carrier, whether party to this Agreement or not, at whose terminal or terminals or place of business there is a controversy between such carrier or its employees on the one hand and a labor union on the other hand; and such goods or equipment shall continue to be 'unfair' while being transported, handled, or used by the

interchanging of succeeding carriers whether parties to this Agreement or not, until such controversy is settled."

Local 89 relied upon the language of this clause as permitting the action taken by the employees of the carriers. The Kentucky Court of Appeals, however, declared: "Such a contractual stipulation is void" (R. 103).

Yet precisely the same type of clause was held valid and bargainable in *Teamsters Union (Rabouin)*, 87 NLRB 972, 982, enforced, 195 F. 2d 906 (C. A. 2); *Teamsters Union (Arkansas Express)*, 92 NLRB 255; and the identical clause was sustained in *Pittsburgh Plate Glass Co.*, 105 NLRB 740, and as recently as December 16, 1954, in *Teamsters' Union (McAllister Transfer, Inc.,)* 110 NLRB No. 224, 35 LRRM 1281.

In all of the above cases the question was presented whether what would otherwise be "secondary" activities involving common carriers would be immune from remedial action by the Board because of the presence of the contractual stipulation. In each case the Board rejected the argument that such contract clause violated any provisions of the Act or demand of legislative history or public policy.[13] Similar holdings were made by federal District Courts whose jurisdiction was invoked under Section 10(1) of the Act: *Madden* v. *Local 442, Teamsters Union*, 114 F. Supp. 932, 937-938 (D. C., Wis.); *NLRB* v. *Lodge 850, A. F. of L. Machinists and Local 880, A. F. of* ., E. D. Mich., October 16, 1954. Likewise the only federal court to consider such contracts in a suit brought under Section 303 of the Labor

[13] It is pertinent to note that in each instance that questions involving this type of clause came before the Board, it was in the context of activities of employees of common carriers refusing to deliver freight to, or pick-up or accept freight from, a particular shipper, consignee, or freight line because of a labor dispute involving such shipper, consignee or freight line. In the last of such instances to come before the Board *(McAllister, supra)* the Board's precedents in the matter were sharply criticized and attacked in a brief filed by the American Trucking Associations, but the Board held to its principle.

Management Relations Act to recover damages from unions for alleged secondary boycotting activities which deprived a primary employer of the pick up and delivery services of common carriers, ruled such contracts were valid and a complete defense to the suit. *Meier & Pohlmann Furniture Co. v. Gibbons*, U. S. D. C. E. D. Mo. E. D., January 10, 1955.

Finally, this Court has expressed its view that the proviso to Section 8(b)(4) "clearly enables contracting parties to embody in their contract a provision against requiring an employee to cross a picket line if they so agree." *NLRB v. Rockaway News Supply Co.*, 345 U. S. 71, 80.

It is clear then, that the type of clause which the State Court cast out as contrary to state policy falls within the area of permissible collective bargaining under the Act.[14]

But under the Kentucky court's decision here, both the demand and the resulting agreement are barred because of the alleged requirements of state law or policy.

The situation thus parallels that which was before this Court in *Bus Employees v. Wisconsin Board*, 340 U. S. 383. There this Court was confronted with a Wisconsin statute which precluded the granting by a board of arbitration of certain union demands which were proper subjects of collective bargaining under the Federal Act. This circumstance was described by the Court as an example of "situations in which application of the Wisconsin Act would work at cross-purposes with other policies of the National Act" and hence one of "direct conflict" (at 398).

The analogy between the cases is exact. The state action here, no less than in *Bus Employees, supra*, causes a forfeiture of bargaining rights of members of Local 89 and a release of obligations of their employers in contravention of the Congressional scheme and in derogation of superior constitutional power.

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[14] Particularly since, as the Board pointed out in *Pittsburgh Plate Glass*, 105 NLRB 740, such clause merely defined their job duties. To the same effect see *Madden v. Local 442, Teamsters Union*, 114 F. Supp. 932, 938 (W. D. Wis.).

In *Overton* v. *Teamsters Union*, 115 F. Supp. 764, 770 (W. D. Mich. S. D.), the court in vacating the Michigan state injunction, after pointing out that the conduct of the employer in securing the injunction probably constituted an unfair labor practice because its provisions directing employees to cross picket lines interfered with rights guaranteed by the National Labor Relations Act (see p. 56, *supra*), also stated that similar interference ensued from the injunction's implicit invalidation of picket line clauses in contracts with carriers. In this respect the court said (at 770):

> "From the record of the trial in this court in Civil Action 2254, it appears that there are certain contracts between the defendant Teamsters Unions and the common carriers which are defendants in the present case, which contracts provide in substance that the employees of the carriers who are members of the Teamsters' Unions should not be required to handle goods sent to or from a strike-bound plant. In view of these contracts, it might well be argued that the State-court injunction which the plaintiff has obtained in the present case would seriously interfere with the rights of the defendant unions and the defendant carriers under their respective contracts. See the cases of *Rabouin d/b/a Conway's Express*, 87 NLRB 792; and *Pittsburgh Plate Glass Co.*, 105 NLRB No. 120."

4. Kentucky's interest in requiring a common carrier to serve all customers without discrimination does not afford any basis for its intrusion upon federally protected rights of employees of either the carriers or their customers.

Any argument that the Kentucky courts were here operating in the field of transportation law rather than labor relations ignores the parties who were before the court, the issues posed and the terms of the injunction issued. No carriers were parties to the suit. Insofar as the record shows no demand that they meet their duties as common

carriers was made upon them by shippers, consignees or state regulatory agencies. There is no showing that the carriers could not have fulfilled any common carrier duties in some other manner. Each of the carriers here involved had hired the members of Local 89 on terms which excluded the work of crossing picket lines from the scope of employment.[15] The State of Kentucky has undertaken to revise the scope of each employee's job, so as to include therein duties he was never hired to perform.

Furthermore, the Kentucky courts do not insist that employees of common carriers have an absolute duty to go through picket lines of a customer. Rather Kentucky insists that the only way for employees to exercise their right to refuse to go through a picket line at the premises of one shipper is to refuse to perform any services for all other shippers. In other words, the employees may engage in a complete cessation of work, but may not accord respect for picket lines as such.

We have already discussed (p. 39, *supra*) the intent of Congress, manifested by Section 10(a) of the Act, as amended, to exclude the states from any regulation of labor relations in the transportation industry. Congress by that section expressly refused to permit any cession to the states of control of labor relations in "transportation except where predominantly local," even where the states were administering state laws consistent with federal law.

[15] The carriers for reasons best known to themselves had contracted to permit members of Local 89 to refrain from performing any of the duties which the Kentucky court now requires them to perform as employees of the carriers. The record (R. 50) indicates that the carriers in entering into these collective bargaining agreements with Local 89 thereby established a practice of not holding themselves out for service through picket lines, a practice valid under current decisions of the Interstate Commerce Commission (see pp. 85-86, *infra*). However, without so limiting the services offered, the carriers might have believed that by some arrangement with supervisory staff, other carriers or other drivers, service through picket lines could be maintained without utilizing members of Local 89. For other suggested alternatives see Note, 67 Harvard Law Rev. 317.

We have also discussed (pp. 45-46, *supra*) this Court's rejection of Wisconsin's claim that public utility operation was so critical to the state as to warrant its Anti-strike Statute. *Bus Employees* v. *Wisconsin Board*, 340 U. S. 383.

Subsequent to this Court's decision in *Bus Employees* v. *Wisconsin Board*, 340 U. S. 383, holding the Wisconsin Public Utility Anti-Strike Statute invalid both the Board and the courts, state as well as federal, have had numerous occasions to reject state anti-strike statutes involving either a public utility or other industry deemed critical by the state. *Wheatland Electric Coop.*, 102 NLRB 1119 enforced 208 F. 2d 878 (C. A. 10), certiorari denied, 347 U. S. 966 (Kansas Statute prohibiting strikes in public utilities does not justify discharge); *Henderson* v. *Florida*, 65 So. 2d 22 (Florida Sup. Ct., 1953, holding Florida Public Utility Arbitration Law in conflict with Labor Management Relations Act); *Marshall* v. *Schricker*, 28 LRRM 2167 (Ind. Cir. Ct., 1951, same respecting Indiana Public Utility Anti-Strike Act); *Consolidated Vultee*, 108 NLRB No. 95 (Texas statute limiting nurses to representation by unions whose constitution forbids strikes invalid as applied to industries subject to National Labor Relations Act).

The same considerations which impelled the foregoing decisions that the states are precluded from preventing total interruptions in all industries, no matter how critical to the state, must also impel the conclusion that the state may not prohibit a partial interruption which is a concerted activity within the protection of Section 7.

Obviously the injury to the public generally and to neutrals would be greater from a total strike of a common carrier than from only the refusal to serve the immediate primary employer whose employees are involved in a dispute protected by the federal act. Hence every consideration of policy and reason which forbade a state from prohibiting a total cessation of operations requires that a state order forbidding merely a partial failure of performance be likewise held beyond the state's power where it conflicts with Federal law.

But assuming that the State of Kentucky was applying its state policies concerning the duties of common carriers rather than labor relations law, the decision of the Kentucky courts does not thereby become any less an intrusion upon federally protected rights.

The power of the Federal Government to achieve the objectives of the National Labor Relations Act, as amended, would be seriously hampered were the states free to apply state laws which, though designed to deal with non-labor relations problems, had the effect of depriving employees of rights guaranteed by the federal labor laws. The great variety and extent of such state laws possible, were states accorded this power, is obvious. Federal regulation would be fragmentary and piecemeal in character were states free to superimpose such regulation ahead of federal law. Illustrative is *Hazen & Jaeger Funeral Home*, 95 NLRB 1034, 1036, 1046-1047, enforced 203 F. 2d 807 (C.A.9), where the employer relied upon a Washington State statute entitled "Interfering With a Dead Body or Funeral" as illegalizing all picketing of funeral homes. The Board held that if the picketing did violate this Washington statute, the federal law was paramount.

If Congress has protected the Union activity which the state has forbidden, then the state legislation must yield. *Auto Workers* v. *O'Brien*, 339 U. S. 454.

Any other test merely begs the question and would place the answer to federal supremacy on the ingenuity or resourcefulness of the pleader, or the particular state law upon which the state tribunal choses to rest its decision.

Here the state is dealing with concerted activities of a particular type of employees; it is dealing with those activities in connection with a labor dispute to which those employees are parties[16]; it seeks to impose upon those employees a greater obligation to the public than employees in other industries; and requires them to cease engaging in

[16] The members of Local 89 are employees under Section 2(3) of the National Labor Relations Act, as amended, and are involved in a labor dispute under Section 2(9) of that Act.

certain activities which, under federal law, all other employees may engage in.

To say that the state may do this without unlawfully depriving employees of rights assured by federal law merely because the basis for the restraint is found in general legislation dealing with common carriers rather than specific "labor legislation" would be to sanction a device by which the principle involved becomes a nullity.

It is clear above all else that basically and essentially the state regulation here is based upon the type of employee involved, not the type of activity. The complete answer to such attempted distinction is *Bus Drivers* v. *Wisconsin Board*, 340 U. S. 383.

Finally, since all of the carriers involved appear to have been engaged in interstate transportation (R. 6, 12, 27, 38, 41, 42, 51, 52, 53, 58), the state law respecting their common carrier duties is immaterial. These duties were governed by the Interstate Commerce Act, and as we shall show hereinafter, that Act, as interpreted by the Commission, imposes no duties on carriers inconsistent with the Labor Management Relations Act (see pp. 85-88, *supra*). But if it did, it would be for the federal agencies rather than the state to reconcile any inconsistency and to apply the dominant federal policy.

II.

The Interstate Commerce Act precludes Kentucky from applying its laws, defining the duties of a carrier, to require employees of common and contract carriers engaged in interstate transportation, to receive and deliver property through a valid picket line established at the plant of a consignee or shipper, where the carriers and their employees have a collective bargaining agreement, permitting respect for picket lines and non-handling of unfair goods, which has never been held invalid by the Interstate Commerce Commission.

Federal law has preempted the regulation of the duty of interstate common carriers by motor vehicle to serve with-

out discrimination. The provisions of the Interstate Commerce Act not only provide the substantive rule applicable but vest the Interstate Commerce Commission with exclusive primary jurisdiction to determine whether any practice of such a carrier constitutes unjust discrimination. The Interstate Commerce Commission has considered various aspects of the duty of common carriers to furnish strike-bound customers with pick-up and delivery service. It has held that carriers may properly define the type of customers they are willing to serve so as to exclude any holding of themselves out as willing to serve consignees or shippers whose premises were picketed. *Pick Up Delivery Restrictions in Official Territory*, 269 I.C.C. 191, 192, 193. It has held that carriers may enter into and comply with collective bargaining contracts permitting respect for picket lines. *Montgomery Ward* v. *Consolidated Freightways*, 42 M.C.C. 225. The decision of the Kentucky courts thus not only intrudes upon the exclusive primary jurisdiction of the Interstate Commerce Commission but also applies a rule of law in conflict with applicable decisions of the Commission.

A. Kentucky state law respecting common carrier duties to serve without discrimination.

Although no common carrier was a party to the instant suit, the Kentucky courts based their decision expressly on "the legal duty of a common carrier to handle the merchandise of a shipper without discrimination" (R. 102-103). The Kentucky courts held that the existence of a picket line at the place of business of a customer afforded no reasonable basis for denying him exactly the same service as was afforded the non-picketed customer. They based this decision on their interpretation of the Kentucky state constitution, the Kentucky common law and Kentucky statutes (R. 99). The decisions below do not purport to apply the rules established under the Interstate Commerce Act despite the admittedly interstate character of most, if not all,

of the common carriers whose employees were ordered to cross picket lines to deliver goods to and from American Tobacco (R. 6, 12, 27, 38, 41, 42, 51, 52, 53, 58). No distinction was made in the decree between common carriers subject to the Interstate Commerce Act and carriers involved in purely intrastate operations.

The Kentucky courts held that the Kentucky law imposed the duty to serve all customers without discrimination on the common carrier's employees as well as on the common carrier (R. 99). The Kentucky courts held that any contract by which a carrier exempted any of its employees from the duty to serve any customer was in conflict with Kentucky law and hence void (R. 103). No recognition was given to the fact that a carrier might desire to hire union employees who would not accept employment without contractual assurance that their duties would not include crossing of picket lines or handling of unfair goods. No recognition was given to the fact that a common carrier hiring employees on such a basis may hold itself out as serving only non-picketed customers. Of course, if the type of customer which a carrier holds itself out to serve does not include picketed customers, a carrier is not violating his implied offer to serve by declining service across a picket line. Cf. *Pick Up Delivery Service in Official Territory*, 269 I.C.C. 191, 192. No consideration was given to the fact that the carriers might have available to them alternative methods of serving the picket-bound customer which would not compel union members to cross picket lines against their wishes.

The decision was not based on any facts peculiar to American Tobacco. Rather the Kentucky courts based their decision on their interpretation of Kentucky law as requiring common carriers to serve strike bound or picketed customers. The decision hence purports to be a broad decision of the duty of common carriers to serve strike bound or picketed customers. Likewise it is apparent that Kentucky was not holding the picketing and unfair goods clauses of

the collective bargaining agreements merely inapplicable to excuse refusal of service to American Tobacco. Rather the contractual provisions permitting respect for picket lines and non-handling of unfair goods were held void (R. 103).

The adjudication of the Kentucky courts thus assumed the character of a broad determination that the practice of common carriers to refrain from requiring their union members to serve strike-bound or picketed customers was a violation of their duties as common carriers under Kentucky law.

B. The applicable provisions of the Motor Carrier Act

Under the federal Motor Carrier Act of 1935, (49 U.S.C. 301, *et seq.*) initial exclusive jurisdiction to determine whether an interstate common carrier violates a duty to make and accept deliveries without discrimination by a practice of not making such deliveries where his employees respect picket lines established at a customer's premises is lodged in the Interstate Commerce Commission, which body has in fact, as will be discussed later, taken jurisdiction to determine the precise question involved here on various occasions. To permit the various courts in the forty-eight states to attempt such determinations would work confusion and destroy uniformity in a field where uniformity and clarity is indispensable to the proper functioning of motor vehicles in channels of interstate commerce and where Congress has specifically provided that the Interstate Commerce Commission, as the federal body expert in the field, make such determinations, and such determinations have, as a matter of administrative practice, been made.

Section 216(b) of the Motor Carrier Act (49 U.S.C. 316(b)) states that it shall be the duty of every common carrier by motor vehicle to establish and observe just and reasonable regulations and practices relating to the manner

and method of delivering property for transportation.[17]

Section 216(d) of that Act (49 U.S.C. 316(d)) specifically makes it unlawful for any common carrier by motor vehicle engaged in interstate commerce to subject any particular person to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.[18]

Section 216(e) (49 U.S.C. Sec. 216(e)) confers jurisdiction upon the Interstate Commerce Commission, upon complaint of any person or on its own complaint, to determine that any rule, regulation or practice of any common carrier by motor vehicle is in violation of subsection 216(b) or (d), and to prescribe the lawful rule, regulation or practice thereafter to be made effective.[19]

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[17] "Sec. 216(b). It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce."

[18] "Sec. 216(d). . . . It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: . . ."

[19] "Sec. 216(e). Any person, State board, organization, or body politic may make complaint in writing to the Commission that any such . . . classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this section or of section 217. Whenever, after hearing, upon complaint or in an investigation on its own initiative, the Commission shall be of the opinion that any . . . classification, rule, regulation, or practice whatsoever of such carrier or carriers . . . is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial, it shall determine and prescribe the . . . lawful classification, rule, regulation, or practice thereafter to be made effective. . . ."

Section 222 of the Motor Carrier Act of 1935 (49 U.S.C. 322) provides criminal penalties for violation of the Act and permits the Commission to apply to the District Courts of the United States for enforcement of the Act.

Finally, the National Transportation Policy, as adopted by Congress in 1940 which constitutes an amendment to the Interstate Commerce Act (49 U.S.C., preceding Sections 1, 301, 901 and 1001) makes very clear that it is the policy of Congress to provide for fair and impartial regulation of all modes of transportation subject to the Act, and to eliminate unjust and undue preferences or advantages, all to the end of developing, coordinating and preserving a uniform national transportation system by water, highway and rail.[20]

C. The prevention of discriminatory practices as the chief objective of the Interstate Commerce Act.

It is apparent from the foregoing that the Motor Carrier Act specifically makes unlawful any practice of discrimination whatsoever by carrier by motor vehicle and confers exclusive jurisdiction upon the Commission initially to

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[20] "**National Transportation Policy**

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

determine whether any alleged discriminatory practice violates the Act. Indeed, the prevention of discriminatory practices has been held repeatedly by this Court to be the key purpose of those sections of the Interstate Commerce Act.[21]

In *Louisville & N. R. Co.* v. *United States*, 282 U. S. 740 this Court stated (at 749-750):

> "The legislative history of the Interstate Commerce Act shows clearly that the evil of discrimination was the principal thing aimed at. Senate Report No. 46, 49th Cong. 1st sess., p. 215. See *Kansas City S.R. Co.* v. *C. H. Albers Commission Co.*, 223 U. S. 573, 597. This Court has said that the language of the Act 'is certainly sweeping enough to embrace all the discriminations of the sort described which it was within the power of Congress to condemn.' *The Shreveport Case*, 234 U. S. 342, 336."

In *United States* v. *Baltimore & Ohio R. Co.*, 333 U. S. 169, it was stated (at 175):

> "The Interstate Commerce Act is one of the most comprehensive regulatory plans that Congress has ever undertaken. The first Act, and all amendments to it, have aimed at wiping out discriminations of all types, *New York* v. *United States*, 331 U. S. 284, 296, and

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[21] While the decisions hereinafter discussed relate mainly to that portion of the Interstate Commerce Act regulating railroads, those same provisions have their exact counterparts in the Motor Carrier Act. Thus, the counterpart of Section 216(b) is Part I of the Interstate Commerce Act, Sec. 1(4)(11). Counterpart of Section 216(d) is Part I of the Interstate Commerce Act, Sec. 1(5), Sec. 2, and Sec. 3(1). Counterpart of Section 216(e) is Part I of the Interstate Commerce Act, Secs. 13 and 15(1). See *Bell Potato Chip Co.* v. *Aberdeen Truck Line*, 43 M.C.C. 337, 341, for a determination by the full Interstate Commerce Commission that provisions of the Motor Carrier Act of 1935 were intended to be the counterpart of similar sections relating to common carriers by railroad, and that the decisions and principles applicable to comparable provisions of Part I of the Interstate Commerce Act relating to railroads are determinative in construing the comparable provisions of the Motor Carrier Act.

language of the broadest scope has been used to accomplish all the purposes of the Act."

See also *New York* v. *United States*, 331 U. S. 284, 296.

D. Controlling court decisions respecting the exclusive primary jurisdiction of the Interstate Commerce Commission.

For almost half a century the principle has been firmly established that where Congress has made specific activities of common carriers in interstate commerce unlawful and has conferred jurisdiction upon the Interstate Commerce Commission to determine whether violations of duties and obligations imposed by congressional enactment have taken place, the state common law and state statutory rights and remedies are thereby superseded, so that initial resort must be had to the Interstate Commerce Commission to establish whether such violations do in fact exist. The leading case is *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, where this Court held that Texas state courts were without jurisdiction to award a shipper damages on the ground that a rate posted in a tariff as provided by the Interstate Commerce Act was unjust or unreasonable where there had been no prior ruling by the Interstate Commerce Commission holding it unjust or unreasonable. This Court said (at 440):

". . . Indeed, no reason can be perceived for the enactment of the provision endowing the administrative tribunal which the act created with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the Act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the Commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission in the premises. This must be, because, if the power

existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of the Court. In other words, the established schedule might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible."

The *Abilene* case disposed of the contention that Section 22 of the Interstate Commerce Act (49 U. S. C. 22)[22], which finds its counterpart in the Motor Carrier Act under Section 216(j) thereof and which preserves common law remedies,[23] operates to permit resort to the state courts to enforce what the Kentucky Court of Appeals has found to be a common law duty. This Court speaking of Section 22 said (at 446):

"This clause, however, cannot in reason be construed as continuing in shippers a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself. The clause is concerned alone with rights recognized in or duties imposed by the act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the act should be regarded as cumulative, when other appropriate common-law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act."

Applied to the instant case, Section 206(j) could have no force until after primary resort to the Interstate Commerce Commission. For the practice in the instant case, which was challenged in the Kentucky courts as discriminatory,

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[22] "Sec. 22. . . . nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies;"

[23] "Sec. 216(j) (49 U. S. C. 316 (j)). Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith."

may likewise be submitted to the Interstate Commerce Commission for a ruling on its legality. If the Commission should determine that the practice is illegal, then an effort to invoke common law remedies might bring Section 22 or Section 206(j) into play. But until such determination has been made by the Interstate Commerce Commission it cannot be said, without destroying the uniformity which the Act seeks to achieve, that rights as well as remedies can be adjudicated in the state courts.

A case which is entirely analogous, and which compels the view that the practice complained of herein is one the legality of which must be initially adjudicated by the Interstate Commerce Commission, is that of *Midland Valley Railroad Company* v. *Barkley*, 276 U. S. 482. There, as here, the common carrier, through no fault of its own, was involved in a strike among its customers. The strike had caused a shortage of the more desirable open-top coal cars, and the railroad had allocated the open-top cars to various of its customers according to what the carrier considered a reasonable allocation under the circumstances. A customer who was supplied boxcars rather than open-top cars under this arrangement brought suit in the Arkansas state courts to recover damages for the alleged failure of the carrier to furnish during the period of the car shortage an adequate supply of open-top cars. The highest court of that state sustained a judgment for damages which had been awarded by the trial court and overruled the contention that the proper distribution of the cars under the circumstances was an administrative question which Congress had committed to the Interstate Commerce Commission, and that plaintiffs should have sought relief before that board. On appeal to this Court the plaintiffs below contended, as respondent does here, that the action was sustainable on the theory of a common law duty to furnish cars, which duty had been found to exist by the state court under a state statute; that Section 22 of the Interstate Commerce Act preserved such common law remedies; and that, finally, the suit involved

no attack upon any regulation or order of the Interstate Commerce Commission itself. There, as here, the plaintiff cited and relied heavily upon *Pennsylvania Railroad Co.* v. *Puritan Coal Co.*, 227 U. S. 121, in support of its contention that no administrative question was involved. This Court, reversing, speaking through Justice Brandeis, made unanimous answer to these contentions as follows:

> ". . . The law exacts only what is reasonable from such carriers. The reasonableness of the rule adopted by the carrier is a matter for the Commission *Pennsylvania R.R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121, 133, 134, 59 L. Ed. 867, 873, 874, 35 Sup. Ct. Rep. 484. In the case at bar, the right of the plaintiffs to recover depended upon whether the defendant's practice of distributing its open top cars to tipple mines and its boxcars to wagon mines was reasonable. . . ."

It is respectfully submitted that the foregoing decision is dispositive of the issues in this case. There, as here, the particular practice complained of was occasioned by a strike situation in which the carrier was not involved and which was beyond its control. There, as here, because of such strike situation the carrier was obliged to make a rearrangement of its shipping practices. Whether such rearrangement was a reasonable one under all of the circumstances was held to be a question exclusively for the Interstate Commerce Commission to determine. While there the alleged breach was a common law duty to furnish cars, and here the alleged breach is a common law duty not to discriminate, in both instances the ultimate question was the reasonableness of the particular practice engaged in. In both cases we have involved a practice applied generally to all customers, a determination respecting which would govern the future actions of the carrier. An adjudication in this respect clearly involves the exercise of the regulatory function of the Commission. There is no distinction in principle between the circumstances involved in the *Midland Valley*

R. R. Co. case and the circumstances involved in the present case.

Another closely analogous decision is that of this Court in *Baltimore & Ohio R. Co.* v. *United States ex rel. Pitcairn Coal Co.*, 215 U. S. 481. As in the *Midland Valley* case, the practice of the carrier which was complained of involved a regulation adopted by the carrier for the distribution of coal cars in times of car shortage. Likewise, in the *Pitcairn Coal* case the practice was challenged as being discriminatory. However the suit was for mandamus to put an end thereto and was instituted in the Federal District Court without prior resort to the Interstate Commerce Commission. The United States Court of Appeals for the Fourth Circuit held that there was power in the District Court to consider the subject matter and award the relief prayed without prior resort to the Interstate Commerce Commission. In reviewing, this Court held as follows.[24]

> ". . . When the situation is thus defined we see no escape from the conclusion that the grievances complained of were primarily within the administrative competency of the Interstate Commerce Commission, and not subject to be judicially enforced; at least, until that body, clothed by the statute with authority on the subject, had been afforded, by a complaint to it, the opportunity to exert its administrative functions."

Again it would appear that the principles enunciated above are entirely applicable to the present case where the practices involved are also complained of as being in violation of the carrier's duty not to discriminate. In essence, a determination of whether the practice of the carrier in the instant case in respect to making pickups and deliveries on strike-bound premises was discriminatory or not depends, as we have seen, upon the reasonableness of the

[24] Incidentally, the Court indicated that it could and would consider this question even without assignment of error, the issue going to the power of the court to consider the subject matter at all.

refusal under the circumstances. Such questions of reasonableness respecting practices of carriers in interstate commerce are peculiarly for the Interstate Commerce Commission to determine.

In *Northern Pacific R. Co.* v. *Solum*, 247 U. S. 477, a suit for damages in the Minnesota state courts, the question was whether a carrier had a duty to ship by the cheaper of two routes. This Court, speaking through Justice Brandeis, held there was no absolute duty so to ship, that whether the carrier's practice in this respect was discriminatory or otherwise unlawful depended upon the reasonableness of the practice in each case, and that this qustion of reasonableness was solely for the Interstate Commerce Commission to determine in the first instance. The Court stated as follows (at 482):

> "The railway contends that, since the administrative question upon which its liability depends involves the reasonableness of a practice in interstate commerce and the traffic actually moved in interstate commerce, the court had no jurisdiction to adjudicate the controversy until that administrative question had been determined by the Interstate Commerce Commission. The shipper, on the other hand, urges that the rule which requires such preliminary determination of administrative questions by the Commission applies only to those cases where the question involved is whether a particular rate is unreasonable or whether a particular practice is discriminatory. But the rule is not so limited. It applies, likewise, to any practice of the carrier which gives rise to the application of a rate."

Mitchell Coal & Coke Co. v. *Pennsylvania Railroad Co.*, 230 U. S. 247, states the same concept even more forcibly. That case involved an action to recover damages because of alleged discriminatory rebates. This Court concluded that initial action before the Interstate Commerce Commission was mandatory since a determination of the legality of the practice involved a question of reasonableness. This Court stated (at 256-257):

"It is argued that this conclusion ignores Sections 9 and 22 which give the shipper the option of suing in the courts or applying to the commission. The same argument was made and answered in the *Abilene* case by showing that to permit suits based on the charge that a particular practice was unreasonable, without previous action by the Commission, would repeal the many provisions of the statute requiring uniformity and equality. • • • But where the suit is based upon unreasonable charges or unreasonable practices, there is no law fixing what is unreasonable and therefore prohibited. In such case the whole scope of the statute shows that it was intended that the Commission and not the courts should pass upon that administrative question. When such order is made, it is as though the law for that particular practice had been fixed, and the courts could then apply that order, not to one case, but to every case, thereby giving every shipper equal rights and preserving uniformity of practice. Section 9 gives the plaintiff the option of going before the Commission or the courts for damages occasioned by a violation of the statute. But since the Commission is charged with the duty of determining whether the practice was so unreasonable as to be a violation of the law, the plaintiff must, as a condition to his right to succeed, produce an order from the Commission that the practice or the rate was thus unreasonable and therefore illegal and prohibited."

Other cases in support of the proposition for which Local 89 here contends are numerous. Especially persuasive, however, are the following: *Robinson* v. *Baltimore & O. R.*, 222 U. S. 506 (whether there was discrimination in a rate schedule held for sole and initial determination by the Interstate Commerce Commission); *Lewis, Simmis, Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654 (question of reasonableness of a joint through international rate held for initial determination by the Interstate Commerce Commission); *General American Tank Car* v. *El Dorado Terminal Co.*,

308 U. S. 422 (validity of a mileage allowance made by railroads for use of cars held for primary determination by the Interstate Commerce Commission even though the amount of the allowance had not been fixed by the Commission); *Armour & Co.* v. *Alton R. R.*, 312 U. S. 195 (question of whether a railroad must deliver shipments at such a location and in such a manner that shipper need pay no yardage charge held to involve administrative problems necessitating preliminary resort to the Interstate Commerce Commission on authority of the *Abilene* case); *United States* v. *Wabash R. R. Co.*, 321 U. S. 403 (question of whether a carrier's practice in spotting freight cars warrants a special charge held to be for initial determination by the Interstate Commerce Commission. The Court stated: "Differences in conditions may justify differences in carrier rates or service. In determining whether there is a prohibited unjust discrimination or undue preference, it is for the Commission to say whether such differences in conditions exist and whether, in view of them, the discrimination or preference is unlawful.").

A recent expression by this Court of the general principle for which Local 89 herein contends was made in the case of *Garner* v. *Teamsters Union*, 346 U. S. 485. There, in discussing the distinction between "legal rights or duties enforced through the administrative process and those left to enforcement through private initiative through the law courts," it was stated (at 496-497):

> "Federal law has largely developed and expanded as public law in this latter sense. It consists of substituting federal statute law applied by administrative procedures in the public interest in the place of individual suits in courts to enforce common-law doctrines of private right. This evolution, sharply contested, and presenting many problems, has taken place in many other fields as well as in labor law. For example, the common law recognized a shipper's right to have a common carrier transport his goods for reasonable rates, and the right was enforceable in the courts. But this pri-

vate right proved too costly and sporadic to be effective as transport became a vast enterprise. As to interstate commerce, this right was superseded by the Interstate Commerce Act, which, in the public interest, authorized a public tribunal to prescribe reasonable rates and to award reparations for excessive ones. Of course, this put an end to private litigation in state and federal courts to determine, in the first instance, what rate for carriage is reasonable, although that Act did not expressly abolish the pre-existing private rights." (Footnotes omitted.)

The *Abilene* case was cited with approval.

A very recent decision, delivered by Mr. Justice Black for a unanimous court, which affirms the principles advanced by petitioners in this case is *Castle* v. *Hayes Freight Lines, Inc.*, 348 U. S. 61. There, the question involved the power of a state to bar interstate motor carriers from use of state roads as punishment for repeated violations of state highway regulations. The question of conflict with the federal Motor Carrier Act was raised, and this Court held that the federal law operated to supersede state regulations interfering with the free flow of interstate commerce. In so holding, the Court stated (at 63-65):

"Congress in the Motor Carrier Act adopted a comprehensive plan for regulating the carriage of goods by motor truck in interstate commerce. The federal plan of control was so all-embracing that former power of states over interstate motor carriers was greatly reduced. No power at all was left in states to determine what carriers could or could not operate in interstate commerce. Exclusive power of the Federal Government to make this determination is shown by Sec. 306 of 49 U. S. C. which describes the conditions under which the Interstate Commerce Commission can issue certificates of convenience and necessity."

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"Under these circumstances, it would be odd if a state could take action amounting to a suspension or revocation of an interstate carrier's commission-

granted right to operate. Cf. *Hill* v. *Florida*, 325 U. S. 538."

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"It is urged that without power to impose punishment by suspension states will be without appropriate remedies to enforce their laws against recalcitrant motor carriers. We are not persuaded, however, that the conventional forms of punishment are inadequate to protect states from overweighted or improperly loaded motor trucks. Moreover, a Commission regulation requires motor carriers to abide by valid state highway regulations. And as previously pointed out, the Commission can revoke in whole or in part certificates of motor carriers which willfully refuse to comply with any lawful regulation of the Commission. If, therefore, motor carriers persistently and repeatedly violate the laws of a state, we know of no reason why the Commission may not protect the state's interest, either on the Commission's own initiative or on complaint of the state." (Footnotes omitted.)

Two leading law review articles fully support the position for which Local 89 contends in this case. They are "Duty of Common Carrier to Cross Picket Line of Shipper's Employees to Receive Goods for Carriage," 67 Harv. L. Rev. 317 (1953), and "The Plight of a Strike-Bound Carrier," Charles H. Woods, 34 Minn. L. Rev. 255 (1949).

A leading—perhaps the leading—case in the state courts respecting the question of state versus federal jurisdiction in the field of interstate shipping is that of *New York Lumber Trade Association* v. *Lacy*, 154 Misc. 747, 281, N. Y. Supp. 647, affirmed *per curiam*, 269 N. Y., 595, 199, N. E. 688 and 200 N. E. 54, certiorari denied, 298 U. S. 684. There, several shippers brought an action against common carriers by steamship and various labor organizations alleging a conspiracy to discriminate against the plaintiffs by virtue of an understanding between these defendants that the carriers would not receive for shipment any merchandise delivered by non-union teamsters. It was alleged that this conduct or practice was in violation of state common law

forbidding discrimination by common carriers. The New York Supreme Court, Appellate Division, refused to issue the requested injunction which would have directed the carrier defendant to ship the goods of plaintiffs regardless of whether they were handled by union or non-union labor. In denying this injunction it cited the *Abilene* and other cases decided under the Interstate Commerce Act, and stated (281 N. Y. S. at 656):

> "It has been held, generally, that where complaint has been made of a rate or unfair practice, the Commission has jurisdiction in the first instance, despite the aforesaid sections, for, otherwise, uniformity of regulation would be lost, and furthermore, the alert suitor would gain an advantage over his competitors who did not dispute the ruling, rate or practice."

It found that the Shipping Act of 1916 with the Merchant Marine Act of 1920, were the counterpart of the Interstate Commerce Act, and established the same rule of primary jurisdiction. The New York Court rejected the plaintiffs' argument that the Shipping Act made no provision for relief against unions by stating (281 N. Y. S. at 661-662):

> "Respondents question the efficacy of the Shipping Act to furnish relief on the ground that it does not reach the union defendants, but simply relates to carriers. That is on the assumption that the Board will find that the carriers are violating the law by refusing the shipments, not as a matter of chance, but as an alternative to a general strike by the defendant unions. * * * In any event, if an order of the Shipping Board, aimed at the carrier, with the effective modes of enforcement prescribed by the Act, is not sufficiently persuasive to accomplish fair treatment, assuming that the alleged discrimination be found unfair, relief may be accorded under the provisions of Sections 828 and 830 (Title 46, *United States Code*, 46 U. S. C. A. Sections 828, 830) by including all other persons conspiring with the carrier to bring about the unfair and illegal result."

The Court of Appeals affirmed, stating as follows (199 N. E., at 688):

> "2. That the act of Congress of September 7, 1916 . . . 46 U. S. C. A. Section 801 . . . constitutes the sole law of the land to the extent of its scope, covering shipping by intercoastal and foreign shipping lines. 3. The U. S. Shipping Bureau has exclusive primary jurisdiction to determine whether or not carriers by water in interstate and foreign commerce have discriminated or unduly discriminated here. 4. Prior to seeking relief in any court the respondents must seek such relief in the U. S. Shipping Board, in the manner provided by the U. S. Shipping Act."

The Court of Appeals on a motion to amend the remittitur, included the following (200 N. E. at 54):

> "This court having held that if there is any illegality in defendants' actions, it arises from encroachment upon rights regulated by the Shipping Act; and that while this court has jurisdiction of the labor unions, yet, the courts of this state shall not grant an injunction until the Shipping Board has by its order defined plaintiff's rights."

E. Larabee and Puritan Coal cases distinguished.

Counsel for respondent herein relies principally upon the 1909 decision of this Court in *Missouri Pacific R. Co.* v. *Larabee Flour Mills Co.*, 211 U. S. 612, in support of the proposition that the state courts have jurisdiction to adjudicate in the first instance whether interstate carriers acted discriminatorily and in dereliction of their common law duties in not providing pickup and delivery services at strike-bound premises. That case not only is distinguishable but is of doubtful authority. The issue therein was whether the state courts of Kansas could compel, by mandamus action, an interstate carrier to discharge its common law duty to treat all shippers alike by resuming the transfer and return of cars loaded and unloaded between the line of a connecting carrier and the flour mill and eleva-

tor of a particular shipper. The Court, speaking through Mr. Justice Brewer, declared that the Kansas courts did have such authority in the absence of any prior action or directive taken or issued by the Interstate Commerce Commission in the premises. There was a strong dissent by Mr. Justice Moody and Mr. Justice White, in which Mr. Justice Holmes indicated concurrence. The case can be distinguished from the present one on the following grounds:

1. The *Abilene* case, although decided just a few years earlier, was not discussed or even mentioned.

2. The conduct of which complaint was made involved an isolated act of discrimination against one particular shipper, not a practice regularly engaged in as is the case in the instant litigation, and there an obvious act of discrimination was involved.

3. The adjudication that the particular act was discriminatory would not operate to disrupt an existing rule or practice regularly engaged in by the carrier and did not provide a guide for future conduct as respects a particular practice complained of as discriminatory.

4. The regulatory action taken by the state in the premises was deemed by the majority of the Justices to be of a purely local character.

The dissenting opinion pointed out the inconsistency of the position taken by the majority in granting that the Interstate Commerce Commission would have jurisdiction over the controversy, but in permitting the state courts to exercise their jurisdiction in the absence of any assertion of authority by the Interstate Commerce Commission. The dissent stated (211 U. S. at 626):

> "I am not ready to assent to the proposition that, although the Congress has vested in the Interstate Commerce Commission the authority to deal with the exact situation presented to us, that fact is immaterial, because the Commission has taken no action. If the Commission has the authority to deal with a question of this kind, those who have grievances ought to resort

to that body for relief. It is a very great hardship to subject the carriers to possibly conflicting regulations, and leave them uncertain which government may rightfully assert its controlling authority. So it was said in the *McNeill* case, that the order there 'asserted a power concerning a subject directly covered by the act of Congress to regulate commerce, and the amendments to that act, which forbid, and provide remedies to prevent, unjust discriminations and the subjecting to undue disadvantages by carriers engaged in interstate commerce.' This statement was made as an additional reason for holding the state action invalid, and seems in conflict with the holding in this case."

Cases such as *Pennsylvania R. R.* v. *Puritan Coal Mining Co.*, 237 U. S. 121, also relied upon by respondent, are distinguishable on the ground that in those cases state jurisdiction was permitted because there was no challenge respecting a particular rule or practice engaged in by a carrier, but only with the failure of the carrier to comply with its own rule or practice. In those cases no administrative expertise was required in the resolution of the issue. The rule is that resort to the Interstate Commerce Commission must be had in the first instance only when a rule or practice is attacked as unreasonable or discriminatory and not when a rule fair on its face is unequally applied. This Court, in the *Puritan Coal* case, stated in this respect as follows (at 131):

"But it must be borne in mind that there are two forms of discrimination, one in the rule and the other in the manner of its enforcement; one in promulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule. In a suit where the rule or practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission. It is for that body to say whether such a rule unjustly discriminates against one class of shippers in favor of another. Until that body has declared the practice to be discriminatory and unjust, no court has jurisdiction

of a suit against an interstate carrier for damages occasioned by its enforcement. When the Commission has declared the rule to be unjust, redress must be sought before the Commission or in the United States courts of competent jurisdiction, as provided in Sec. 9.

"But if the carrier's rule, fair on its face, has been unequally applied, and the suit is for damages occasioned by its violation or discriminatory enforcement, there is no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage. Such suits, though against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the state or Federal courts."

F. Decisions of the Interstate Commerce Commission.

The fact that the Interstate Commerce Commission has on various occasions taken jurisdiction to adjudicate the precise issue in this case, *i.e.*, the legality of a carrier's practice in respect to making pick ups and deliveries at strike-bound plants, persuades to the conclusion that that body has such jurisdiction. It has taken jurisdiction in a number of cases and without challenge in the courts. See *Pick Up Delivery Restrictions in Official Territory*, 269 I.C.C. 191; *Planters Nut & Chocolate Co.* v. *American Transfer Co.*, 31 M.C.C. 719; *Montgomery Ward* v. *Santa Fe Trail Transportation Co.*, 42 M.C.C. 212; *Montgomery Ward* v. *Consolidated Freightways*, 42 M.C.C. 225; and *Montgomery Ward & Co., Inc.* v. *Chicago, Milwaukee, St. Paul & P. R. Co.*, 268 I.C.C. 257.

In *Pick Up Delivery Restrictions in Official Territory*, 269 I.C.C. 191, the Commission upheld as valid tariffs by which carriers limited their holding out so as to exclude picketed customers from those to whom service was offered. In holding the proposed tariff valid the Commission stated (at 192-193):

"Paragraph (c) of the proposed rule in the same item is an exception to the holding out of the carrier with respect to pick-up and delivery service at any

location where there is any riot, strike, picketing, or other labor disturbance, and is designed primarily to prevent the involvement of carriers in labor disputes in which they are not a party. The most common difficulty confronting the railroads in the performance of pick-up and delivery service is that resulting from strikes of employees of consignees and consignors. Most of the truck drivers employed by the carriers are members of unions, and these drivers usually refuse to cross picket lines. In at least one instance picketing of the carriers' own facilities resulted from performance of delivery service through a picket line. Defendants do not concede that they are at present required to perform service at locations where it is impracticable to do so, but the proposed rule is intended clearly to inform the public as to the holding out of the carriers so as to eliminate as much as possible, arguments and litigation with respect thereto.

"The change in respondents' method of giving notice of arrival of shipments is necessary because sometimes it is impossible to cross picket lines to leave the notice. Where the railroad has advance knowledge that a strike is in progress, it would be a vain act to send a truck to a location where it is known that the driver upon arrival will refuse to cross or will be prevented from crossing the picket line.

"There is nothing in the suspended schedules tending to show that respondents are attempting to escape or limit their common carrier duties. . . ."

The Commission pointed out that other such tariffs had been on file for some time without any complaints (at 196-198).

In the *Montgomery Ward* v. *Consolidated Freightways*, 42 M.C.C. 225, the Commission considered at length the question of the reasonableness of a motor carrier's action in refusing to make deliveries to strike-bound premises as against a charge that such action was discriminatory and unlawful under Section 213(b) of the Motor Carrier Act. In refusing to accord Montgomery Ward any relief the Commission stated (at pp. 230, 235):

"Turning to the facts in the instant proceedings, we think it is sufficiently clear upon this record that the defendants would have found it impossible to continue their operations with non-union labor, and we are of the opinion that it was not incumbent upon them to force the issue to the point of resorting to force and violence. Because of the comprehensive unionization of available labor and the existence of the closed-shop agreement, the defendants would have been confronted with strikes of their own labor if they had persisted in their attempts to serve the complainant, with the result that all of their operations would have been disrupted and probably brought to a standstill. The defendants were therefore faced with the choice, as they reasonably believed, of not serving the complainant and maintaining service to the general public, or of being compelled to discontinue all operations. Obviously, as between these defendants and the general public other than the complainant, the lack of service because of a general strike would have been caused by a strike in which the defendants were directly involved, and their position in defending suits for damages and proceedings before us similar to the instant proceedings, brought by other shippers, would have been more difficult, and their potential liability immeasurably magnified.

"Finally, the complainant urges that, even if it be assumed that under the circumstances prevailing at Portland the defendants found it impossible to serve its plant, this is not a valid excuse for the reason that the circumstances were created in part because of the 'voluntary' action of the defendants in entering into a closed-shop agreement. This agreement, in part, requires that only union members shall be employed, and that the employer shall not discipline any employee 'for upholding union principles.' It also contains the following provision:

* * * * * * *

"'*It shall not be a violation of this agreement for an employee to refuse to go through a picket line established by a bona fide A. F. of L. Union:* . . . (Emphasis supplied.)'

"The sentence italicized was added to the renewal

contract executed as of March 1, 1941, during the course of the strike. As above indicated, it is a 'union principle' not to cross a picket line of an affiliated union."

G. Criteria established in foregoing cases as applied to the instant case.

The foregoing authorities reveal several factors or circumstances which are determinative of whether the issue is one cognizable in the first instance by the Interstate Commerce Commission rather than by the various state or federal courts. The applicable criteria are found in the following questions which are usually asked by this Court in making a determination of jurisdiction:

1. Does the discrimination involve a general practice, rule, or regulation of a carrier as distinguished from an individual or a particular act of the carrier? If the former, exclusive jurisdiction in the Interstate Commerce Commission is indicated. In the present case we have such a general practice involved, as evidenced by the contract between the carrier and the union representing its employees containing the so-called "unfair goods" or "hot cargo" clause (R. 19, 21). Furthermore, the record discloses that the action of the carrier in refusing to make deliveries to struck plants was one applied to all shippers who became involved in picket lines and not merely one applied to American Tobacco alone (R. 50). J. L. Biery, terminal manager of Bowling Green Express, an interstate carrier, testified (R. 50):

> "Usually if there is a picket line, we don't request the men to go over it. They tell us that there is a picket line at such and such a place, and we let it go at that. We call the people and tell them the freight is there, and that is it."

2. Does the issue of discrimination call for a balancing of conflicting public interests by a body having expertise in the technical field involved as distinguished from a judicial

determination of whether an admittedly proper rule, practice, or regulation has been improperly or discriminatorily applied in a particular case? If so, the Interstate Commerce Commission alone can make the initial determination. The determination of the validity of the carriers' general practice not to offer service across picket lines called for an inquiry into all the relevant circumstances and a balancing of conflicting interests.

As appears from the decisions of the Interstate Commerce Commission discussed pp. 85-88, *supra*, it will appraise such factors as whether the carrier would risk a strike by all of its employees if it were to discharge and replace a driver respecting a picket line, thus possibly cutting off deliveries not only to American Tobacco, but to all customers and to the general public. The Interstate Commerce Commission would consider whether the refusal of the carrier's employees to cross the picket line was justified under the circumstances in view of possible violence and incriminations which might ensue. It would decide whether the duty owed the general public to maintain operations might be outweighed by whatever duty was owed American Tobacco Company or other individual customers. It would ascertain whether the practice of refusing to make deliveries in strike situations was a common one in the industry. All these determinations are peculiarly appropriate for resolution by an administrative, as distinguished from a judicial body. 3. Does the remedy establish a rule for the future to govern a continuing problem or merely an award of damages for a past completed act of discrimination? If the former, the Interstate Commerce Commission must make that determination in the first instance. Even where the award is of damages for the past, if the decision would have *in futuro* repercussions by invalidating a general practice, the Interstate Commerce Commission has exclusive primary jurisdiction. Here, the Kentucky courts not only found the practice of refusing to make deliveries to strikebound premises an improper and discriminatory one, but specifically en-

joined such practice in the future either with or without the benefit of the so-called "unfair goods" clause and regardless of any surrounding circumstances. Thus, the determination involved not only a guide but a command respecting future action—a command which the carrier would be obliged to follow in Kentucky but not elsewhere.

CONCLUSION

For the foregoing reasons we respectfully request that this Court reverse the judgment of the Kentucky Court of Appeals and remand with directions to vacate Paragraph 4 of the injunction issued against Local 89 and its members, which reads as follows (R. 36-37):

> "4. From causing, aiding or abetting any common carrier or contract carrier unreasonably to discriminate against plaintiff by refusing while remaining an employee thereof, or inducing, encouraging, coercing or otherwise causing or arranging with common or contract carriers or any persons connected therewith to refuse to accept, transport, and deliver, in accordance with their legal and contract obligations, property shipped by or to plaintiff, so long as property is being handled, transported and delivered by or to other customers of such contract or common carriers."

Respectfully submitted,

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January 28, 1955.

APPENDIX

The pertinent provisions of the Constitution of the United States are as follows:

"Article I.

"Section 8. The Congress shall have power . . .

. . . . . .

"To regulate Commerce with foreign nations, and among the several states and with the Indian Tribes;

. . . . . .

"Article VI.

. . . . . .

"The Constitution, and Laws of the United States which shall be made in pursuance thereof, and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The pertinent provisions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C. 141, *et seq.*) are as follows:

SHORT TITLE AND DECLARATION OF POLICY

Section 1. (a) This Act may be cited as the "Labor Management Relations Act, 1947."

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in

their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT

Sec. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * * * * *

"DEFINITIONS

"Sec. 2. When used in this act—

"(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his

parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

• • • • • • •

"(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

• • • • • • •

"RIGHTS OF EMPLOYEES

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

"UNFAIR LABOR PRACTICES

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

• • • • • • •

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: • • •

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * * * *

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * * Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

* * * * * * *

"**PREVENTION OF UNFAIR LABOR PRACTICES**

"Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise; Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

* * * * * * *

"(1) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 8(b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of the law: * * *

* * * * * * *

"LIMITATIONS

"Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right. * * *"

* * * * * * *

NATIONAL EMERGENCIES

Sec. 206. Whenever in the opinion of the President of the United States, a threatened or actual strike or lockout affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a

written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. The President shall file a copy of such report with the Service and shall make its contents available to the public. * * *

* * * * * * *

Sec. 208. (a) Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out—

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate.

* * * * * * *

BOYCOTTS AND OTHER UNLAWFUL COMBINATIONS

Sec. 303. (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to

cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

* * * * * * *

DEFINITIONS

Sec. 501. When used in this Act—

* * * * * * *

(2) The term "strike includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees.

* * * * * * *

SAVING PROVISION

Sec. 502. Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act.

The pertinent provisions of the Interstate Commerce Act, as amended (54 Stat. 924, 63 Stat. 488, 49 U. S. C. 301, *et seq.*) are as follows:

"§316. Rates; fares and charges—(a) Duty to establish reasonable rates, etc.; service and equipment; rules and regulations; reasonable division of joint fares.

* * * * * * *

"Undue preferences or prejudices prohibited.

(d) All charges made for any service rendered or

to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: Provided, however, That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

"Complaints to and investigation by commission; power of commission to fix reasonable rates, regulations, etc.

"(c) Any person, State board, organization, or body politic may make complaint in writing to the Commission that any such rate, fare, charge, classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this section or of Section 317 of this title. Whenever, after hearing, upon complaint or in an investigation on its own initiative, the Commission shall be of the opinion that any individual or joint rate, fare, or charge, demanded, charged, or collected by any common carrier or carriers by motor vehicle or by aay common carrier or carriers by motor vehicle in conjunction with any common carrier or carriers by railroad and/or express, and/or water for transportation in interstate or foreign commerce, or any classification, rule, regulation, or practice whatsoever of such carrier or carriers, affecting such rate, fare, or charge or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial, it shall determine and prescribe the

lawful rate, fare or charge or the maximum or minimum, or maximum and minimum rate, fare, or charge thereafter to be observed, or the lawful classification, rule regulation, or practice thereafter to be made effective and the Commission shall, whenever deemed by it to be necessary or desirable in the public interst, after hearing, upon complaint or upon its own initiative without a complaint, establish through routes and joint rates, fares, charges, regulations, or practices, applicable to the transportation of passengers by common carriers by motor vehicle, or the maxima or minima, or maxima and minima, to be charged, and the terms and conditions under which such through routes shall be operated: Provided, however, That nothing in this chapter shall empower the Commission to prescribe, or in any manner regulate, the rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose whatever."

* * * * * * *

"§322. Unlawful Operation—(a) Violation of Chapter or rules or orders; penalties where none otherwise provided.

* * * * * * *

"Jurisdiction of district courts to restrain violations and enforce orders.

"(b) If any motor carrier or broker operates in violation of any provision of this chapter (except as to the reasonableness of rates, fares, or charges and the discriminatory character thereof), or any rule, regulation, requirement, or order thereunder, or of any term or condition of any certificate or permit, the Commission or its duly authorized agent may apply to the district court of the United States for any district where such motor carrier or broker operates, for the enforcement of such provision of this chapter, or of such rule, regulation, requirement, order, term, or condition; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such carrier or broker, his or its officers, agents, employees, and repre-

sentatives from further violation of such provision of this chapter or of such rule, regulation, requirement, order, term, or condition and enjoining upon it or them obedience thereto."

The pertinent provisions of the Constitution of the Commonwealth of Kentucky are as follows:

"§196. Transportation; charge for; common law liability.—Transportation of freight and passengers by railroad, steamboat or other common carrier shall be so regulated, by general law, as to prevent unjust discrimination. No common carrier shall be permitted to contract for relief from its common law liability."

The pertinent provisions of the Kentucky Revised Statutes are as follows:

"Section 281.600. Administrative Functions and Powers of the Department.

"The Department of Motor Transportation shall exercise all administrative functions of the state in relations to motor transportation as defined in this chapter, and shall apply, as far as practical, the administrative and judicial interpretations of the Federal Motor Carrier Act. It shall have the right to regulate motor carriers as provided in this chapter, and to that end may establish reasonable requirements with respect to continuous and adequate service of transportation, systems of accounts, records and reports, preservation of records and safety of operation and equipment. It may issue subpoenas, subpoenas duces tecum, and orders of personal attendance for the attendance of witnesses, any proceeding before it, and permit the protection of pertinent records, for taking of depositions, or in accord with the Civil Code of Practice, and it shall have the power to make such rules and regulations as it may deem necessary to carry out the provisions of this chapter.

* * * * * * *

"Section 281.610. Regulation of Interstate Commerce.

"(1) The provisions of this chapter shall apply to interstate commerce, except insofar as such application is in conflict with any provision of the Constitution of the United States or the Acts of Congress.

"(2) The Commissioner may grant a certificate of convenience and necessity for the transportation of persons or property for compensation in interstate commerce, and may regulate such interstate commerce under the authority of and in accordance with the provisions of any Act of Congress vesting in or delegating to the Commissioner such authority as an agency of the United States Government. The Commissioner may notify the proper department of the Federal Government of his assent to the requirements and conditions of such Act of Congress in regard to interstate commerce by motor vehicle.

* * * * * * *

"Section 281.685. Adherence to Rates, Charges, and Schedules; Discrimination.

"(1) No common carrier shall charge, demand, collect or receive a greater, less or different compensation for the transportation of persons and property or for any services, in connection therewith, than the rates, fares and charges specified in its tariffs and classifications filed with the Department and in effect at the time; nor shall any common carrier refund or remit any part of the rates, fares or charges so specified, or make or give any unreasonable preference or advantage to any person, or subject any person to any unreasonable discrimination.

(2) No contract carrier shall charge, demand, collect or receive a greater, less or different compensation for the transportation of persons or property or for any services in connection therewith then that contained in the contract required to be filed with the Department and in effect at the time; nor shall any contract carrier refund or remit any part of the charges specified in the contract, or make or give any unreasonable prefer-

ence or advantage to any person, or subject any person to any unreasonable discrimination.

• • • • • • •

"Section 336.130. Employees may organize, bargain collectively, strike, picket, conduct prohibited.

"(1) Employees may, free from restraint or coercion by the employers or their agents, associate collectively for self-organization and designate collectively representatives of their own choosing to negotiate the terms and conditions of their employment to effectively promote their own rights and general welfare. Employees, collectively and individually, may strike, engage in peaceful picketing, and assemble collectively for peaceful purposes.

"(2) Neither employers or their agents nor employes or associations, organizations or groups of employees shall engage or be permitted to engage in unfair or illegal acts or resort to violence, intimidation, threats or coercion."

• • • • • • •

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IN THE

Supreme Court of the United States

October Term, 1954

No. 186.

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION No. 89, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. of L., an Unincorporated Labor Union; PAUL W. PRIDDY, JOSEPH BURRELL, STOY DECKER, WILLARD MARPLES, JAMES MALLORY, ALMA HARPER, Individually, and as Representatives of a Class Consisting of Members of General Drivers, Warehousemen and Helpers, Local Union No. 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an Unincorporated Labor Union, - Petitioners,

versus

THE AMERICAN TOBACCO COMPANY, INC., - Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Justices of the Supreme Court of the United States:

Respondent, The American Tobacco Company, Inc., respectfully requests that the Petition for a Writ of Certiorari herein be denied upon the grounds hereinafter set forth:

OPINIONS BELOW.

The opinions of the Jefferson Circuit Court, Chancery Branch, are unreported. The memorandum opinion of April 23, 1953, appears in the petition on pages 25-6. The opinion of April 22, 1953, which petitioners have not included in their petition, appears in Appendix A hereto. The opinion of the Court of Appeals of Kentucky, as originally handed down, is reported in 258 S. W. 2d 903. The opinion as modified on rehearing is reported in 264 S. W. 2d 250. For the convenience of this Court, we have printed these opinions in Appendix A in a consolidated form, in order to show the modifications made to the first opinion by the second.

STATUTES INVOLVED.

Petitioners, in their reproduction in their Appendix A of Section 8(b)(4) of the Labor Management Relations Act of 1947, have omitted the important introductory words "It shall be an unfair labor practice for a labor organization or its agents—" A correct reproduction of this section is contained in Appendix B hereto.

QUESTIONS PRESENTED.

Under this heading, petitioners have included as question 1 (b) a point regarding the alleged primary jurisdiction of the Interstate Commerce Commission. It is submitted that this is not a question properly pre-

sented in this case. That point was not raised by petitioners in the lower court or on the appeal to the Court of Appeals of Kentucky. Petitioners attempted to raise it for the first time on a petition for rehearing in the Kentucky Court of Appeals, but there is no sufficient showing that that Court ever decided the point on the merits.

Petitioners omit from their statement under this heading the question whether this Court should pass upon any of the matters involved in this case in view of the fact that the strike which occasioned the litigation was completely settled and ended in June of 1953 and the decision below is in effect, if not in form, entirely moot as concerns these parties.

The question decided in this case was stated by the Kentucky Court of Appeals as follows, 264 S. W. 2d at 254:

> "The appeal involves the refusal of employees of common or contract carriers who are not on strike but who happen to belong to Local 89, the bargaining representative of Suppliers' employees, to transport the merchandise of American through the picket line at 17th and Broadway Streets, and his disobedience is not complained of as an unfair labor practice but as a violation of the common law, the statutory law and the Constitution of Kentucky."

Although, as stated by that Court, the conduct in question was "not complained of as an unfair labor practice," petitioners rely upon the proviso in Section 7 of the Labor Management Relations Act, 1947, which

defines unfair labor practices, as ousting the Kentucky courts of jurisdiction. The Kentucky Court of Appeals has held only that the proviso in question, to the effect that a refusal to cross a picket line in certain circumstances does not constitute an unfair labor practice, has no application, and does not oust the state court of jurisdiction, in a case which does not in any way involve a charge of unfair labor practice.

SUPPLEMENTARY STATEMENT OF THE CASE.

At the outset of this suit a temporary restraining order was entered which forbade refusals to deliver merchandise to respondent in somewhat broader terms than appeared in the permanent injunction.

At the trial which resulted in the permanent injunction, the Court also heard evidence as to whether a number of emloyees of a common carrier had violated the restraining order by refusing to deliver to respondent a shipment of merchandise, under circumstances which would also have constituted a violation of the permanent injunction. The carriers at all times admitted their obligation to render service to Respondent, and through managerial employees, cooperated with respondent's efforts to force their employees to handle respondent's goods. There was no evidence that the refusals were due to threats or physical restraint by the pickets, and, in fact, adequate police protection was available at all times. On this issue petitioners' President, Mr. Priddy, testified that he, on behalf of Local 89, had given a direct order to all

the paid employees of the Union and to a general meeting of the entire membership of the Union that the carriers' employees should continue to handle respondent's shipment (Record, Vol. 3, pp. 229-231, 241). The trial court refused to hold the Union (as an entity) in contempt and dismissed the rule as to it, while fining the individual truck drivers who had refused to deliver to respondent (Record, Vol. 1, pp. 146-7).

While, therefore, as the Kentucky Court of Appeals pointed out, it "so happens in this instance that the carrier employees are members of the same union" as the striking employees, their position here is the same as though they were members of a totally different union. The carrier employees were not on strike and were continuing in the service of their employer. Further, in refusing to perform their duties, the carriers' employees were not acting as agents of, nor on behalf of, the Union.

On June 15, 1953, the strike ended and a contract covering wages and working conditions was entered into between respondent and Local 89 as representative of its employees, and since that date there have been no further refusals by employees of carriers to handle respondent's goods. No appeal was taken from the portion of the injunction limiting the number of pickets. Nor has any appeal been taken from any of the judgments imposing fines for contempt.

ARGUMENT.

1. Analysis of the Injunction.

The portion of the permanent injunction involved in this appeal is very short, and analysis shows that its wording was carefully chosen by the trial judge to make sure that it did not impair any federal rights of the affected employees or infringe upon the jurisdiction of the National Labor Relations Board or the Interstate Commerce Commission.

It enjoins the Union, its members, and their confederates and associates:

> "4. From causing, aiding or abetting any common carriers or contract carrier unreasonably to discriminate against plaintiff by refusing while remaining an employee thereof, or inducing, encouraging, coercing or otherwise causing or arranging with common or contract carriers or any persons connected therewith to refuse to accept, handle, transport, and deliver, in accordance with their legal and contract obligations, property shipped by or to plaintiff, so long as property is being handled, transported and delivered by or to other customers of such contract or common carriers."

The primary act enjoined is the refusal of the carriers' employees to perform their legal duties, and Petitioners' argument is addressed to this portion of the Injunction rather than to the secondary portion which forbids "inducing, encouraging, coercing * * *" the refusal. Assuming that the Court may properly en-

join accomplishment by indirection if it may enjoin the direct act, the exact terms and limitations of the primary portion of the Injunction become the controlling issue in this case. As to this, it will be noted that it does not apply to carriers, nor to the Union as an entity, nor to the striking employees of respondent's subsidiary, but only to a limited portion of the Union's members who are employees of common and contract carriers. Thus it applies only to those who are subject to the Ky. Rev. Stat. §281.685; the employees of non-carriers are not affected.

It applies to these employees only "while remaining an employee," so it does not impair their right to quit.

It applies only "so long as property is being handled, transported and delivered by or to other customers," so it does not impair the right of the carrier employees to strike.

It only forbids refusal to handle goods "in accordance with their legal and contract obligations" and then only when the result is to cause the carriers "unreasonably to discriminate," *i. e.*, to violate the Constitution and statutes and common law of Kentucky. Ky. Rev. Stat. §281.685.

Petitioners state in brief (pp. 6, 13) that it applied to "any customer of any such common carriers engaged in a labor dispute" and to "respondent's subsidiary's premises" (p. 6). More accurately, it applies only to "property shipped by or to plaintiff" (respondent). Respondent's subsidiary's Louisville plants closed down completely during the strike. No shipments to

or from those plants and no picket line other than that around respondent's premises, were ever in question.

It does not apply to picketing or affect the right to picket.

In short, the provision does not require any member of petitioners to perform service without his consent. He is free to strike or quit at any time. But if he chooses to work for a carrier he is obligated to obey the law of Kentucky governing carriers so long as he does so.

The decision of the Court of Appeals of Kentucky affirming this injunctive provision was made pursuant to a long-established rule in that and many other States. As that Court pointed out, 264 S. W. 2d at 253:

> "The rule of law that common carriers and their employees must serve all members of the public without discrimination is firmly established in Kentucky and, as far as we can find, in all the states. Its origin goes far back into the common law. Section 196 of the Constitution of Kentucky embodies the principle in this language: 'Transportation of freight and passengers by railroad, steamboat or other common carrier, shall be so regulated, by general law, as to prevent unjust discrimination. No common carrier shall be permitted to contract for relief from its common law liability.' Subsections 1 and 2 of KRS 281.685 read in part that no common or contract carrier shall 'subject any person to any unreasonable discrimination.' KRS 281.990 (1) stipulates that any person who 'violates, or causes, aids or abets any violation of, any of the provisions of this chapter,'

which includes KRS 281.685 (1) and (2), 'shall be fined not less than fifteen dollars nor more than two hundred dollars, or imprisoned for not more than thirty days or both."

These statutes, as the Court pointed out, subject these employees to both civil and criminal prosecution. It concluded, 264 S. W. 2d at 254:

> "We find nothing in the provisions of the above Act [the Labor Management Relations Act, 1947] nor in the decisions of the Supreme Court of the United States construing it that makes such conduct legal when from time immemorial the several states have branded it as illegal."

2. This Case Is Not of Sufficient Current Importance to Justify Review by This Court.

This case arises out of a labor dispute which began in March, 1953, and ended in June, 1953. Since that time there has been no labor dispute between Suppliers and Local 89, and the employees of common carriers who are members of Local 89 have not refused to make deliveries to respondent. For all practical purposes, this case came to an end more than a year ago. There is no matter of pressing importance which requires decision by this Court.

There remains in effect a permanent injunction issued by the Jefferson Circuit Court, Chancery Branch, which was affirmed by the Court of Appeals of Kentucky. It is this injunction alone which keeps this case from being wholly moot; but the fact that a case technically is not moot does not mean that it requires

decision by this Court. For over a year respondent, Suppliers, and the members of Local 89 (both those who work for Suppliers and those who work for the common carriers in and around Louisville) have gone their ways and carried on their activities as they normally would in times of labor peace, just as if the paragraph of the permanent injunction which petitioners complain about were not in effect. This paragraph does not command petitioners to do anything different from what they would normally do; it is thus not hanging over the heads of petitioners as a constant threat. If petitioners dislike the existence of an injunction which commands them to do what they normally would do, they may easily seek to have the equity court terminate its decree. It is well settled that an equity court may dissolve its injunctions when it appears that they have been faithfully complied with, that future breaches are not anticipated, and the interests of justice so require.

In *Gregory* v. *Crain*, 291 Ky. 194-198, 163 S. W. 2d 289, the Kentucky Court of Appeals adopted the statement of the law in 28 *Am. Jur.* §323, as follows:

> "There is no doubt but that the court which renders a decree for a permanent or perpetual injunction may open or modify the same where the circumstances of the parties are shown to have so changed as to make it just and equitable to do so, * * * The court has inherent power in this respect and may exercise it after the term in which the decree is rendered."

Further stating (p. 199) that:

> "* * * all courts, as well as text-writers, are in accord with what we have stated to the effect that the authority conferred by the law upon courts to issue injunctions is flexible, and the discretion which is vested in the court is to be measured by the facts in each case, including the consequences that might be entailed as a result of granting the relief."

3. No Question is Presented of Conflict Between State Jurisdiction and That of the National Labor Relations Board.

(a) NO RIGHT GUARANTEED BY THE LABOR MANAGEMENT RELATIONS ACT, 1947, OR OTHER FEDERAL LAW IS INFRINGED BY THE INJUNCTION.

The employees of a common or contract carrier have a duty of performing their services for all shippers without discrimination under the common law, the constitutional and the statutory law of Kentucky.* In this respect they are in an entirely different situation from the employees of an ordinary private employer who may lawfully give or withhold services from any customer at his pleasure.

That carriers' employees have the right to strike is beyond question. But the injunction here recognizes that right. It only prohibits refusal to handle respondent's goods while handling goods for others. Thus the only right in question is the right of a carrier's employee to discriminate against one shipper while continuing to serve other customers and remaining a work-

*Appendix B, pp. 59-60.

ing employee of the carrier. Neither the Labor Management Relations Act (Sections 7, 8b4, and 13 are cited by Petitioner), nor any decided case indicates that any such right exists.

Section 7 of the Labor Management Relations Act, so far as here applicable, provides:

> "Employees shall have the right to * * * assist labor organizations * * * and to engage in other concerted activities for the purpose of * * * other mutual aid or protection."

In *Auto Workers* v. *Wisconsin Board,* 336 U. S. 245 (1949), this Court held, at 257 *et seq.,* that this section was intended to prevent otherwise lawful activities to aid unionization being treated as illegal conspiracies because they were undertaken by many persons acting in concert, but that it did not mean that otherwise illegal action is made legal because undertaken by persons acting in concert.

Section 13 of the Labor Management Relations Act provides:

> "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

Again, in the *Auto Workers,* case, *supra,* the union had adopted the tactics of causing sudden, unexpected and irregular work stoppages, illegal under Wisconsin law. It was contended in this Court that the Wisconsin courts were powerless to enjoin this conduct be-

cause of Section 13 of the Labor Management Relations Act. This Court held, at 264-5:

> "If we were to read §13 as we are urged to do, to make the strike an absolute right and the definition to extend the right to all other variations of the strike, the effect would be to legalize beyond the power of any state or federal authorities to control not only the intermittent stoppages such as we have here but also the slowdown and perhaps the sit-down strike as well. Cf. *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, 751.
>
> "We think that this recurrent or intermittent unannounced stoppage of work to win unstated ends was neither forbidden by federal statute nor was it legalized and approved thereby. Such being the case, the state police power was not superseded by congressional Act over a subject normally within its exclusive power and reachable by federal regulation only because of its effects on that interstate commerce which Congress may regulate. *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1; *Bethlehem Steel Co.* v. *Board*, 330 U. S. 767.
>
> "We find no basis for denying to Wisconsin the power, in governing her internal affairs, to regulate a course of conduct neither made a right under federal law nor a violation of it and which has the coercive effect obvious in this device."

With respect to Section 8b4, in the *Rockaway News* case, 345 U. S. at 80, it was said:

> "In the section by which the Labor Management Relations Act prescribes certain practices of

labor organizations which shall be deemed unfair, there is a proviso that nothing therein 'shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act * * *' This clearly enables contracting parties to embody in their contract a provision against requiring an employee to cross a picket line if they so agree."

But that does not mean that such a provision invalidates existing law or excuses its observance.

The Court in the *Rockaway News* case did not accept the view expressed in the dissenting opinion, 345 U. S. at 81, that this "takes away rights of employees which the Taft-Hartley Act left standing."

Conceding that this proviso does not "make unlawful" a refusal not theretofore unlawful, nevertheless it certainly does not attempt to legalize refusal that was previously forbidden by the law relating to carriers.

And if a private employer's contract with its employees justifies enforcement of a *contractual* duty to cross a picket line, certainly the public interest justifies enforcement of the *legal* duty to cross a picket line which the law of carriers has always imposed upon carriers' employees.

In *Rabouin v. National Labor Relations Board,* 195 F. 2d 906 (1952), the validity of a provision au-

thorizing union employees to respect picket lines was not decided. The court merely held that the union's request not to handle Rabouin's goods was addressed to employers, not to employees, and therefore was not an unfair labor practice under the Labor Management Relations Act. The duty of a common carrier and its employees to serve without discrimination was not touched upon.

(b) THE LABOR MANAGEMENT RELATIONS ACT, 1947, OFFERS NO REMEDY FOR THE INJURY TO WHICH THE INJUNCTION APPLIES.

Section 10 (a) of the Labor Management Relations Act empowers the Board to prevent any person from engaging in any unfair labor practice *listed in Section 8* of the Act and affecting commerce.

In other words, the section defines certain specified acts which are unfair labor practices if and when committed "by a labor organization or its agents." The section then contains a proviso as follows:

> "*Provided,* That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act."

Under this proviso, refusal to cross a picket line under the circumstances stated in it is expresssly excluded from the unfair labor practices which the Na-

tional Labor Relations Board may prevent a union or its agents from committing.

The holding of the Court of Appeals of Kentucky in this case that respondent and its subsidiary "operate as a unit" and that their alliance "is so close that both may be considered as one operation," 264 S. W. 2d at 252, makes this proviso apply. The Board therefore was not authorized to take action with respect to the refusal of the truck drivers to cross the picket line.

A second ground upon which the National Labor Relations Board would have refused to take jurisdiction is that, as we have emphasized, Section 8 (b) of the Act applies to acts of labor organizations and their agents; except when they are acting as agents of a labor organization, it does not apply to acts of individual employees.

The Union in the present case expressly disclaimed responsibility for the drivers' refusals to cross the picket line and took the position that it desired them to do so, as noted in the supplementary statement of facts above. The refusals which occurred and were punished were therefore the spontaneous refusals of individuals, and not acts of a labor organization, or its agents.

The National Labor Relations Board therefore was without jurisdiction or power to control either the acts that were done or the individuals who were guilty of doing them. It is apparent, therefore, that the action involved here was, as the Kentucky Court of Appeals held, "not complained of as an unfair labor practice,"

264 S. W. 2d at 254, and does not fall within the jurisdiction of the National Labor Relations Board.

Since the carriers' employees affected by the injunction were not thereby deprived of any right guaranteed them by Federal law, and no Federal remedy for wrongful conduct has been provided, the State court properly took jurisdiction to protect respondent from irreparable injury, under the holding of this Court in *United Construction Workers* v. *Laburnum Corp.*, 347 U. S. 656 (1954), and the cases therein cited.

In interpreting the Labor Management Relations Act this Court has not lightly attributed to Congress an intention to override State law. *Allen-Bradley Local No. 1111* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, 749 (1942), cited with approval in *International Union, United Automobile Workers of America* v. *Wisconsin Employment Relations Board*, 336 U. S. 245, 252-3 (1949).

In *Allen-Bradley Local No. 1111* v. *Wisconsin Employment Relations Board*, 315 U. S. 740 (1942), this Court affirmed the right of a State to enjoin mass picketing accompanied by threats and violence. This Court recognized that "a State was exercising its historic powers over such traditionally local matters as public safety and order and the use of streets and highways," and said, "We will not lightly infer that Congress by the mere passage of a Federal Act has impaired the traditional sovereignty of the several States in that regard." 315 U. S. at 749.

A particularly apposite case is *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490 (1949). There this

Court upheld provisions of a Missouri statute forbidding restraints of trade as against contentions that it violated the Constitution of the United States. A union of ice peddlers in Kansas City, Missouri, sought to induce all non-union peddlers to become members. It exerted compulsion upon them by inducing wholesalers of ice to refrain from selling ice to any but union peddlers. The Empire Storage & Ice Co. refused to yield to union compulsion, claiming that if it did so, it would violate the Missouri statute penalizing restraints of trade. Missouri enjoined the union from picketing the building of Empire Storage & Ice Co., and this Court affirmed, concluding, 336 U. S. at 504:

> "While the State of Missouri is not a party in this case, it is plain that the basic issue is whether Missouri or a labor union has paramount constitutional power to regulate and govern the manner in which certain trade practices shall be carried on in Kansas City, Missouri. Missouri has by statute regulated trade one way. The appellant union members have adopted a program to regulate it another way. The state has provided for enforcement of its statutory rule by imposing civil and criminal sanctions. The union has provided for enforcement of its rule by sanctions against union members who cross picket lines. * * * We hold that the state's power to govern in this field is paramount, and that nothing in the constitutional guaranties of speech or press compels a state to apply or not to apply its anti-trade-restraint law to groups of workers, businessmen or others."

The parallels to the case which petitioners seek to bring to this Court are obvious. Kentucky has regulated common carriers one way. Petitioners have adopted a program to modify the duty of common carriers to serve their customers. The Court of Appeals of Kentucky resolved the conflict in favor of the power of the State, and that resolution, under the decisions of this Court, is correct.

In *Local Union No. 10, United Association of Journeymen Plumbers & Steamfitters* v. *Graham*, 345 U. S. 192 (1953), this Court upheld the right of Virginia to enforce its public policy that neither membership nor non-membership in a labor union should be made a condition of employment. The right of Virginia to enjoin peaceful picketing carried on in violation of the statute was recognized.

Petitioners seek to present their case to this Court for a decision upholding an abstract right to refuse to cross picket lines. Whatever may be said of this right, it is less important than the firm public policy of Kentucky that common carriers and their employees shall carry out their duties.

4. The Question of Interstate Commerce Commission Jurisdiction Was Not Timely Presented to the State Court; it is Not Raised in the Pleadings and Was First Argued on the Petition For Rehearing; and it Does Not Appear That it Was Decided on the Merits, or Otherwise, Since State Law Does Not Require the Courts of Appeals of Kentucky to Adjudicate the Merits of a Question Not Raised in the Trial Court.

Was respondent's only remedy for the refusal of the truck drivers to cross the picket line an application to the Interstate Commerce Commission for a determination that it constituted a discriminatory practice, and then a further application to the Commission to proceed under Section 222 (b) of the Interstate Commerce Act, 49 U. S. C. §322 (b), to enforce its order?

This contention was first raised by petitioner in its petition for rehearing, after the decision of the case on the merits by the Court of Appeals, although the fact that transportation in interstate commerce was involved was obvious from the commencement of the suit. The point was not raised by the pleadings, nor covered by the record upon which the Court of Appeals decided the case. The original opinion of the Court of Appeals did not refer in any way to the question of interstate commerce, and none of the modifications* made pursuant to the petition for rehearing refer or relate to it. It is not discussed and no authorities are cited. There is nothing in the record or in the final opinion to indicate that the question of Interstate

*See Appendix A, pp. 52, 54, 56, 57.

Commerce Commission jurisdiction was considered or determined *on its merits.*

The situation is thus no different from that in *Rooker* v. *Fidelity Trust Co.*, 261 U. S. 114, 117 (1923):

> "All that appears is that after the judgment of affirmance the plaintiffs sought to raise the question by a petition for rehearing, which was denied without opinion. But that effort came too late. *Bushnell* v. *Crooke Mining & Smelting Co.*, 148 U. S. 682, 689; *Godchaux Co.* v. *Estopinal*, 251 U. S. 179; *Citizens National Bank* v. *Durr*, 257 U. S. 99, 106 * * *. It is at least doubtful that the question is one of any substance, but its tardy presentation renders further notice of it unnecessary."

A similar holding appears in *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444, 455 (1924):

> "This Court has always held it a prerequisite to the consideration here of a federal question in a case coming from a state court that the question should have been raised in that court before decision, or that it should have been actually entertained and considered upon petition to rehear. A mere denial of the petition by the state court without opinion is not enough."

See, also, *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 163 (1932).

Petitioners' effort to bolster their position by the certificate of Mr. Justice Stewart, of the Court of Appeals of Kentucky, is unavailing.

For one thing, the certificate is insufficient under the rule of *Charleston Federal Savings & Loan Association* v. *Alderson,* 324 U. S. 182, 186 n. 1 (1945). In that case this Court refused to accept a memorandum opinion of the presiding justice of a State court of last resort to the effect that a Federal question was raised and decided. Chief Justice Stone wrote:

> "While a certificate of the state court, made part of the record, to the effect that the federal question in issue was decided there is generally sufficient to sustain our jurisdiction, when it is consistent with the record * * *, a certificate to the same effect by the presiding justice of the state appellate court does not suffice, although it may serve to interpret indefinite or ambiguous evidence in the record, relied upon to show that the federal question was raised."

In any event, there is no indication in the record before this Court that the Kentucky Court of Appeals determined the Interstate Commerce Commission question on its merits, and it had no occasion to do so. The point was made so late in the litigation that the Court could not properly consider it, but was required by its own rules to reject it.

Under the settled law of Kentucky, the Court of Appeals does not determine questions not raised in the trial court.

> "It is an unvarying rule that a question not raised or adjudicated in the Court below cannot be considered when raised for the first time in this Court." *Combs, Judge,* v. *Knott County Fiscal Court,* 283 Ky. 456, 141 S. W. 2d 859 (1940).

To the same effect are *Tipton* v. *Brown,* 273 Ky. 496, 117 S. W. 2d 217 (1938) *Dorman* v. *Hook,* 260 Ky. 367, 85 S. W. 2d 1001 (1935); and, in more detail with citation of substantial authority, *Benefit Ass'n of Ry. Employees* v. *Secrest,* 239 Ky. 400, 411, 39 S. W. 2d 682, 686-7 (1931).

This question is therefore not properly before this Court for consideration.

Radio Station WOW v. *Johnson,* 326 U. S. 120 (1945), is closely in point. There, on rehearing, the question was raised whether the State court had any jurisdiction because primary jurisdiction was in the Federal Communications Commission. The Nebraska Supreme Court considered this point and decided it adversely on two grounds: first, it was unsound on the merits; second, it had not been raised by the pleadings. Since this Court does not review a State court decision resting on an adequate non-Federal ground, even though the State court has also decided the Federal question, this Court held that the question of primary jurisdiction was no longer open.

Thus the attempt to import the decision of the Federal question of the primary jurisdiction of the Interstate Commerce Commission into the case by means of a certificate of a justice of the Court of Appeals of Kentucky does not help petitioners. The Federal question was raised too late below. It is too late to raise it here.

5. The Injunction Does Not Infringe Upon the Jurisdiction of the Interstate Commerce Commission.

(a) THE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION IS NOT EXCLUSIVE.

If this Court deems that the question of the exclusive jurisdiction of the Interstate Commerce Commission is open for its consideration, it is nevertheless submitted that petitioner's contention is wholly without merit.

The Interstate Commerce Act is not intended to occupy the entire field of transportation law so as to deprive State courts of all jurisdiction of cases arising under the Act; on the contrary, it expressly preserves existing statutory and common-law rights and remedies.

Section 9, 49 U. S. C. §9, provides that any person claiming to be damaged by any carrier may complain to the Commission *or* may bring suit in his own behalf, but must elect which remedy he will pursue.

Section 22, 49 U. S. C. §22, provides in part:

> "* * * nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies;"

Section 216 (j) of the same Act, 49 U. S. C. §316 (j), provides:

> "Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith."

This Court, in *Missouri Pacific Ry.* v. *Larabee Flour Mills Co.*, 211 U. S. 612 (1909), upheld a judgment of the Supreme Court of Kansas requiring the Railroad to serve the Mills without discrimination, and disposed of the contention that jurisdiction of the Interstate Commerce Commission was exclusive, saying, at 619-620, 623-624:

> "The Missouri Pacific engaged in the business of transferring cars from the Santa Fe track to industries located at Stafford, and continued to do so for all parties except the mill company. So long as it engaged in such transfer it was bound to treat all industries at Stafford alike, and could not refuse to do for one that which it was doing for others. No legislative enactment, no special mandate from any commission, or other administrative board was necessary, for the duty arose from the fact that it was a common carrier. This lies at the foundation of the law of common carriers. Whenever one engages in that business the obligation of equal service to all arises, and that obligation, irrespective of legislative action or special mandate, can be enforced by the courts.
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> * * * * * * *
>
> "On the other hand, it is said that Congress has already acted, has created the Interstate Commerce Commission, and given to it a large measure of control over interstate commerce. But the fact that Congress has entrusted power to that commission does not, in the absence of action by it, change the rule which existed prior to the creation of the commission. Congress could always regulate interstate commerce, and could make specific provisions in reference thereto, and yet this has not

been held to interfere with the power of the state in these incidental matters. * * * Running through the entire argument of counsel for the Missouri Pacific is the thought that the control of Congress over interstate commerce and a delegation of that control to a commission necessarily withdraws from the State all power in respect to regulations of a local character. This proposition cannot be sustained. Until specific action by Congress or the commission the control of the State over these incidental matters remains undisturbed. But it is further contended that this is not a mere incidental matter, indirectly affecting interstate commerce, but directly a part of such commerce, and therefore beyond the power of the State to control, and in support of that, *McNeill* v. *Southern Railway Company*, 202 U. S. 543, is referred to. There are many points of resemblance between that case and this, but there is this substantial distinction: In that was presented and determined solely the power of a state commission to make orders respecting the delivery of cars engaged in interstate commerce beyond the right of way of the carrier and to a private siding—an order which affected the movement of the cars prior to the completion of the transportation, while here is presented, as heretofore indicated, the question of the power of the State to prevent discrimination between shippers, and the common-law duty resting upon a carrier was enforced. This common-law duty the State, in a case like the present, may, at least in the absence of Congressional action, compel a carrier to discharge."

(b) NO QUESTION REQUIRING DETERMINATION BY THE INTERSTATE COMMERCE COMMISSION WAS PRESENTED BY THIS CASE, INASMUCH AS THE ILLEGALITY OF THE TRUCK DRIVERS' REFUSAL TO SERVE RESPONDENT WAS NEVER QUESTIONED, AND THE INJUNCTION ONLY APPLIES TO SITUATIONS WHERE UNREASONABLE DISCRIMINATION EXISTS.

The wrong which the injunction here sought to prevent was the arbitrary and unlawful refusal by drivers employed by common carriers to handle shipments to or from respondent's plant. This refusal was motivated solely by their desire to assist other members of the same union in their dispute with respondent's subsidiary. It was not based upon any difficulty or danger that would be encountered; there was none. It was not based upon any rule or practice of the employing carriers, for the carriers did everything in their power to persuade their employees to handle the goods, and never questioned their obligation, as carriers, to see that the shipments were moved. The carriers were not parties to the case, and the injunction is not directed at them. They were not doing anything which the Interstate Commerce Commission could forbid, nor refusing to do anything which the Commission could command. There was no administrative question between the carriers and respondent which called for exercise of the specially qualified jurisdiction of the Commission. As between the carriers and respondent there was no question at all.

That the State courts are authorized to grant relief in such situations was made clear in this Court's decision of *Pennsylvania Railroad* v. *Puritan Coal Mining Co.*, 237 U. S. 121 (1915), a suit brought in a State

court by a shipper to recover damages for the Railroad's discrimination in not furnishing as many cars as its own rules called for. In upholding the State court's judgment, this Court referred to the Interstate Commerce Act as follows, 237 U. S. at 130:

> "It gave shippers new rights, while at the same time preserving existing causes of action. It did not supersede the jurisdiction of state courts in any case, new or old, where the decision did not involve the determination of matters calling for the exercise of the administrative power and discretion of the Commission; or relate to a subject as to which the jurisdiction of the Federal courts had otherwise been made exclusive."

Noting that the case had been treated as an offense against the common-law duty, the State statute, and the Federal statute, this Court held that the shipper was entitled to recover for breach of the common-law duty, 237 U. S. at 133, and that the question of fact involved was properly determinable by the State court, 237 U. S. at 131-2:

> "But if the carrier's rule, fair on its face, has been unequally applied and the suit is for damages, occasioned by its violation or discriminatory enforcement, there is no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule, to plaintiff's damage. Such suits though against an interstate carrier for damages arising in interstate commerce may be prosecuted either in the state or Federal courts."

If it had been necessary to determine the reasonableness of the refusal to handle respondent's shipments, that question could have been determined by the State court as a question of fact under the foregoing authorities. But the injunction by its terms applies only to unreasonable discrimination and no evidence was offered that the refusal of the drivers in this case was other than unreasonable.

The only question in this case is a question of law uncomplicated by any matters of administrative discretion. The courts are the proper bodies to decide questions of law, and recourse need not be had to the Interstate Commerce Commission. *Turner, Dennis & Lowry Lumber Co.* v. *Chicago, Milwaukee & St. Paul Ry.*, 271 U. S. 259, 262 (1926); *Great Northern Ry.* v. *Merchants Elevated Co.*, 259 U. S. 285 (1922); *Pennsylvania Railroad* v. *Somman Shaft Coal Co.*, 242 U. S. 120 (1916); *Pennsylvania Railroad* v. *International Coal Mining Co.*, 230 U. S. 184, 197 (1913); *Louisville & Nashville Railroad* v. *F. W. Cook Brewing Co.*, 223 U. S. 70, 84 (1912); *Pacific Gamble Robinson Co.* v. *Minneapolis & St. L. Ry.*, 83 F. Supp. 860 (D. Minn. 1949), appeal dismissed, 181 F. 2d 812 (8th Cir. 1950).

(c) THE INTERSTATE COMMERCE COMMISSION WAS WITHOUT POWER TO GRANT OR OBTAIN RELIEF AGAINST THE REFUSAL OF THE TRUCK DRIVERS TO PERFORM THEIR DUTIES.

The duty and authority of the Interstate Commerce Commission under Part II of the Interstate Commerce Act, 49 U. S. C. §§301 *et seq.*, is to regulate carriers by motor vehicle and to establish reasonable requirements

with respect to them and as to qualifications and maximum hours of service of employees and safety of operation and equipment.*

Except as hours of service and safety of operation are concerned, it does not appear that it was the intent of Congress to regulate the individual employees of the carriers.

The refusal of the carriers' employees to handle respondent's shipments was not a matter which affected the safety of the operations of the carriers. Consequently, we find no authority vested by this Act in the Commission under which it could have required the individual employees to perform their duties.

On the contrary, Section 222(b) of the Act, 49 U. S. C. §322(b), only authorizes the Commission to apply to the United States District Court for the enforcement of the provisions of the Act or of its rules and orders. And, while the District Court is generally authorized by this section to enforce obedience thereto by writ or injunction or by other process, it is prohibited by the Norris-Laguardia Act, 29 U. S. C. §104 (a),† from requiring the delinquent drivers to perform their duties.

Accordingly, it would have been impossible for respondent to obtain, through proceedings before the Interstate Commerce Commission, the relief which it obtained in the State court here.

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*Section 204, 49 U. S. C. § 304, Appendix B, p. 61.
†Appendix B, p. 61.

6. The Decision Below Properly Invalidated the Agreement Permitting Employees of Common Carriers to Refuse to Cross Picket Lines.

The collective bargaining agreement, in effect at the time of the strike against Suppliers, between Local 89 and the common carriers in and around Louisville contanied the following, in part:

> "It shall not be considered a violation of this Agreement for employees covered hereunder to refuse to cross a picket line of a Union or refuse to handle unfair goods."

The refusal of a carrier's employee to handle goods of a shipper with whom he has a personal quarrel is a crime under Kentucky law, as well as a violation of other Kentucky statutes. A private agreement between petitioners and their employer to the effect that commission of this crime "shall not be a violation of this Agreement" does not mean that it cannot be a violation of the laws of Kentucky and that thereby the employees have rendered the State of Kentucky powerless to enforce its laws against them. With equal logic it could be argued that the truck drivers in question could steal or destroy the shipper's goods, or set fire to its factory, if his employer by contract waived any objection to such conduct.

May any person—even a member of a union—by a private contract exempt himself from violation of the criminal law of his State, or from the consequences of his torts against third parties?

The court below disposed of the contention that the provision in petitioners' contract with their employer excused them from serving respondent as follows, 264 S. W. 2d 250 at 254-5:

> "* * * The legal duty of a common carrier to handle the merchandise of a shipper without discrimination existed long before the contract came into being, and, by like token, employees of such carriers, as long as they voluntarily remain in the hire of their employers, do not have the lawful right to withhold their services from a particular customer who deals with their employers. Here the common carriers and its employees seek by a contractual provision to avoid the responsibility imposed by a statute which implements a constitutional provision, and we hold that such a contractual stipulation is void."

In the language of Mr. Justice Holmes in *Hudson County Water Co.* v. *McCarter,* 209 U. S. 349, 357 (1908):

> "* * * One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject-matter."

And *Dillingham* v. *McLaughlin,* 264 U. S. 370, 374 (1924):

> "* * * The operation of reasonable laws for the protection of the public cannot be headed off by making contracts reaching into the future."

The situation here is analogous to *Local Union No. 10, United Association of Journeymen Plumbers & Steam Fitters* v. *Graham*, 345 U. S. 192 (1953). There a Virginia statute invalidated any agreement between any employer and any labor union whereby persons not union members would be denied the right to work for the employer. This Court upheld the Virginia statute in a case where a labor union sought to compel an employer to agree not to employ non-union men. Even if there had been a written agreement between the employer and the labor union in the *Graham* case whereby the employer agreed not to employ non-union men, it could not be held that such an agreement could supersede contrary State law. Similarly it cannot be argued in a situation such as *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490 (1949), that a written agreement between the parties could have taken the case out of the Missouri law against restraints of trade. Likewise it may not be argued now that an agreement between common carriers and the bargaining agent of their employees may abrogate the Kentucky law regulating common carriers.

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: September 7, 1954.

APPENDIX A.

JEFFERSON CIRCUIT COURT

CHANCERY BRANCH, SECOND DIVISION.

No. 341 067

THE AMERICAN TOBACCO COMPANY, INC., - *Plaintiff,*

v.

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. of L., is the authorized representative for the purpose of collective bargaining of employees of American Suppliers, Inc., - *Defendants.*

OPINION.

Since the morning of March 30th this Union and its members and associates have been on strike and have maintained picket lines at, or adjacent to, the plant of American Suppliers. On April 6th, at the insistence of the plaintiff herein, American Tobacco Company, Inc., a restraining order was issued enjoining certain acts upon the part of the Union, and specifically prohibiting the Union from maintaining pickets at the Broadway entrance to plaintiff's property at 17th and Broadway and from refusing, through its members, to make deliveries of property shipped to the plaintiff or to induce or encourage others from making deliveries of such property.

The plaintiff professes to be a stranger to the labor dispute between defendants and American Suppliers, al-

though it is admitted that the last named corporation is a wholly owned subsidiary of plaintiff. Locally the two Corporations are indeed separately administered. Mr. John G. Hager is the Branch Manager of The American Tobacco Company, and Mr. W. B. Turner occupies a similar position with American Suppliers. Neither takes orders from the other, although they, of course, cooperate with each other. The superiors of both are in the Home Offices of the two Corporations at points outside of Kentucky. Since it is not denied, it must be presumed that somewhere in a higher echelon, perhaps as high as the Board of Directors of the parent Corporation, common control is exercised over all elements of both corporations, including the two local organizations. The physical layout of the plants is significant. In the local telephone directory both American Tobacco Company and American Suppliers are listed as being located at 1700 West Broadway in this City. The plant of American Suppliers is, loosely speaking, located in the middle of an industrial area, all of which is owned by The American Tobacco Company. Indeed, the ground upon which American Suppliers' plant was erected is owned by American Tobacco and leased to American Suppliers. American Suppliers' plant cannot be entered without crossing property owned by and under the control of American Tobacco. American Suppliers pays American Tobacco rental for the use of its property, but no witness could state the terms of the lease or whether there is a written lease. Except where the various factory buildings abut the perimeter of the plant area, a high fence serves to enclose it. Thus the whole property, including American Tobacco and American Suppliers, appears to the casual observer as the plant area of one industrial owner. No fence separates American Tobacco from American Suppliers.

American Suppliers buys raw tobacco, puts it through initial processing, sells it to American Tobacco, which further processes it into marketable products of cigarettes, etc. Mr. Turner testified that the entire output of Ameri-

can Suppliers is purchased by American Tobacco. A conveyor belt connecting the two plants delivers the processed tobacco from American Suppliers to American Tobacco.

Indicative of how closely enmeshed are the operations of the two Corporations is the undenied fact that a truck owned and operated by the American Suppliers displays an advertisement of Lucky Strike Cigarettes, a well known product of American Tobacco. Moreover, a building of American Suppliers located at 7th and Arcade (not involved in this injunction proceeding except incidentally), has a sign over its entrance "American Tobacco Company."

Occasionally employees of American Suppliers do work for American Tobacco, although when they do a record is kept and American Tobacco pays American Suppliers for such services. Employees of American Suppliers for several months now have been receiving four packages of American Tobacco Cigarettes as part of their weekly compensation. Separate cafeterias are maintained for the employees of the two Companies, and recently separate first aid facilities were established. If, however, an employee of American Suppliers is seriously injured or takes seriously ill, he or she is sent to the American Tobacco Hospital, there being no such facilities at American Suppliers' plant.

Much testimony was heard to the effect that certain gates, or entrances, were normally used by American Suppliers' employees and certain others by employees of American Tobacco, but at least one gate certainly was available to be used commonly by employees of both Corporations. The parking lot is also used by both Corporations. The power plant supplies steam to both Corporations, although American Tobacco renders statements according to "flow meter" readings to American Suppliers for the amount of steam that Corporation uses.

Under this set of facts the Union contends that its picketing against American Tobacco is primary and not secondary picketing.

At the outset the picketing was not peaceful. There was much testimony relative to the vulgar and insulting lan-

guage used by pickets to other employees crossing the picket lines. Among other things, Union members are accused of having called those crossing the picket lines "hound dog". In a spirit of levity the Union insisted in Court that the term "hound dog" was not used as an insult but rather insisted that the pickets were merely repeating the words of a popular song, allegedly one of the current favorites on the radio. The Court would be inclined to accept this explanation if it were not for the fact that "hound dog" was one of much milder insults that the Union members were accused of employing. The Court is satisfied from the testimony that much stronger and much more vulgar and vituperative language was freely indulged in by the pickets.

Worse, however, than the language were acts of violence indulged in by the pickets. The Court is convinced that there was shoving and tripping of other employees. There was mass picketing. Auto tires of other persons were punctured. Ice picks were used. Roofing nails were scattered in driveways. On a few occasions bricks were hurled. Some damage, including a broken flood light, was caused. One truck had all four tires slashed. This conduct is inexcusable.

In addition there is evidence that the strike has been conducted in an atmosphere of threats.

With this factual background, the Court is confronted with two serious legal issues. First, the Union contends that the Taft-Hartley Act vests the N.L.R.B. and Federal Authority with exclusive jurisdiction to enjoin picketing which amounts to a secondary boycott and, therefore, claims that this Court is without jurisdiction. Counsel cite a California case, Gerry of California v. Superior Court, 194 F. 2d 689, and a Minnesota case, Norris Grain Co. v. Nordaas, 46 N. W. 2d 94. Both involved acts amounting to secondary boycotting. In holding that the Federal Authority was exclusive, the California Court specifically based its opinion on the fact that the "Union objective and the means employed to attain it were not unlawful inso-

far as the law of this State is concerned". The only challenge made against the Union activity was that it violated the Taft-Hartley Act.

The Minnesota case was a writ of prohibition proceeding in which the State Court was prohibited from proceeding with an injunction restraining the Union from engaging in picketing which amounted to a secondary boycott. Both the National Labor Relations Act and the Minnesota Act contained provisions outlawing secondary boycotts. The Court held that the Federal Act vested exclusive jurisdiction in the N.L.R.B. to enforce the provisions against secondary boycotting.

It does not appear that any contention was made before the Minnesota Court that State Courts have the power to protect the private property of the State's citizens against any otherwise unlawful acts committed against such private property. The only unlawful acts complained of were the secondary boycott acts, which were claimed to be unfair labor practice contrary to both Minnesota and Federal law.

In the situation before this Court, counsel for the Union insists that, if the acts of the Union in picketing American Tobacco are unlawful in any way, they are unlawful only because they constitute a secondary boycott, and they, therefore, must come within the exclusive jurisdiction of the N.L.R.B. With this the Court cannot agree.

If the Union pickets American Tobacco when it has no dispute whatsoever with American Tobacco (conceding for the purpose of this discussion that American Tobacco is a stranger to this labor dispute), and by so doing coerces or influences persons not to make deliveries of needed merchandise and material to American Tobacco, the American Tobacco Company is placed in position to suffer irreparable damages. A wrong has been committed against it for which there should be a remedy. It may be that that wrong constitutes a secondary boycott which could give rise to a remedy under the Taft-Hartley Act. But that wrong also constitutes a violation of Kentucky law in a field not

covered exclusively by the Federal Act. It is violative of the Kentucky Constitutional provisions, which seek to protect the private property of our citizens and also contrary to K.R.S. 336.130, not necessarily because it is a secondary boycott but because it is an unfair and illegal act calculated to cause irreparable damage to plaintiff.

The Court is fortified in its opinion by the recent opinion of the Court of Appeals in the Blue Boar Cafeteria Co. v. Hotel and Restaurant Employees, 254 S. W. 2d 335. There the question of the right peacefully to picket was held not to be exclusively a Federal question controlled alone by the Freedom of Speech Amendment to the Federal Constitution, but, rather it was held to be determined by the public policy of Kentucky as announced in K.R.S. 336.130 and as interpreted by the Courts. This holding was in keeping with several decisions of the Supreme Court of the United States, cited in the opinion of the Blue Boar case. It is true that the Blue Boar case did not involve interstate commerce. However, in the opinion of this Court, the interstate commerce of plaintiff would deprive this Court of jurisdiction only if the sole basis of this Court's asserted jurisdiction was that the acts constituted a secondary boycott. Lay aside for the moment the issue of American Suppliers being a wholly owned subsidiary of American Tobacco, in the absence of that issue, the acts committed by the Union against American Tobacco would amount to a wrong against American Tobac , whether or not they also constitute a secondary boycott.

Numerous cases were cited by plaintiff sustaining the right of state courts to exercise traditional police power to suppress violence, protect property, etc. The following quotation from Erwin Mills v. Textile Workers Union of America, C.I.O., 67 S. E. 2d 372, 234 N. C. 321, is a clear statement of the function of the state courts in these matters:

> "In our opinion there is nothing in the provisions of the Taft-Hartley Act or in the decisions of the

Supreme Court of the United States in construing the provisions thereof that interferes with the right of a State to exercise its traditional police power to suppress violence, to prevent breaches of the peace, to prevent an employer and his employees from being intimidated by violence or the threat of violence or to protect property and to safeguard its lawful use during a strike or labor dispute. The proper exercise of such power does not impinge upon the lawful rights of labor within the purview of the Constitution of this State, the Constitution of the United States, or the Taft-Hartley Act."

The other legal question arises from the American Tobacco Company's claim to be a total stranger to the labor dispute between the Union and American Suppliers. To support this claim, plaintiff relies upon the separate entities of the two Corporations and cites two cases involving labor matters, one the case of N.L.R.B. v. Timken Silent Automatic Co., 114 F. 2d 449 and State v. Casselman, 205 P. 2d 1131, an Idaho case.

It is not believed that the Timken case is authority on the issue here involved. There, the N.L.R.B. was attempting to enforce one of its orders against a subsidiary corporation and the court held that, in the absence of a showing that the parent corporation controlled the subsidiary in such manner as to bring about a wrong or a fraud, the two corporations could not be treated as one. The question there was the enforcement of an order against a corporation. It did not involve the question of whether the picketing of a parent corporation amounted to a primary rather than the secondary picketing. Even in the situation there considered, a strong dissenting opinion was written. The Idaho Court affirmed a conviction of pickets for engaging in secondary picketing contrary to an Idaho Statute. There, two subsidiary corporations of American Telephone and Telegraph Co., The Mountain States Telephone and Telegraph Co., and the Western Electric Company, both had labor disputes with different Unions. The Telephone Company settled its dispute, and the union of the Electric

Company continued to picket the Telephone Company. Prosecution ensued.

It was contended by the Union that the picketing was primary and not secondary, because both Companies were wholly owned by American Telephone and Telegraph and, therefore, the corporate veil should be pierced. The Idaho Court held otherwise, pointing out that the operation of the two corporate entities was not shown to be a subterfuge or an evasion. The Court relied on the fact that Western Electric had been organized in 1881 and sold its products in other fields than that engaged in by the Telephone Company and it also sold them throughout the United States, while the Telephone Company involved operated in only seven states.

The Court pointed out that both Unions and Employers recognized that the two labor disputes against the two different Companies were separate and distinct disputes. In making ultimate settlement of both labor disputes, both Unions and Employers treated and recognized the disputes as distinct from each other.

We do not have a similar situation here. The strike is not yet settled, and far from recognizing that American Tobacco is not a party to its dispute, the Labor Union is strenuously claiming that it is such party.

The Idaho Court also pointed out that it was stipulated therein that the parent Company, American Telephone and Telegraph had no power to represent the subsidiary and, hence, "no power to bind or control them, and the separate settlements show the constituant unions acquiesced in this. If the parent had no control, the subsidiary would have had even less over another subsidiary". The Idaho Court pointed out that these two subsidiaries were part of a total of twenty-three corporate subsidiaries of the parent, American Telephone and Telegraph.

We do not have that situation here. It is true that Mr. Hager manages American Tobacco and Mr. Turner manages American Suppliers and locally have no control over each other. But, as pointed out above, it must be presumed

that, since American Suppliers is a wholly owned subsidiary, in some higher echelon there is a common control over the local offices of both Corporations.

The right of a union to conduct a strike is a powerful weapon in its hands. The Taft-Hartley Act, other Federal Laws, and the laws of the Commonwealth of Kentucky all tend to sustain the right of the Union so to strike. Unquestionably, here the Union has the right to strike against American Suppliers as the primary employer of the Union. To hold that picketing American Tobacco Company would be secondary picketing rather than primary picketing solely on the ground that the two Companies have separate corporate entities might well serve to deprive the Union of the powerful weapon which our laws intend to preserve.

In 16 A.L.R. 2d at page 778, the annotator discussing the effect of community of interest between primary and secondary employers upon the legality of an alleged secondary boycott, makes these very pertinent remarks:

> "An important factor in determining whether the activities of a union against an employer other than the one with which the union has a labor dispute come within the purview of the secondary boycott, is the relationship between the two employers. If the relationship is so close that one may be regarded as the ally of the other, picketing of the one may be permissible during a labor dispute with the other."

An interesting case is that of Douds v. Metropolitan Federation of Architects, 75 F. Supp. 672. That case involved the construction of Section 8 (b) (4) A of the Taft-Hartley Act, as applicable to a strike conducted by the union recognized by Ebasco Corporation, during which the union also picketed a partnership known as Project, which subcontracted much of Ebasco's work. Although the Corporation and partnership had no common ownership of any kind, the Court held the picketing to be primary rather than secondary. While it is true we are not here construing the Taft-Hartley Act, the Douds case is authority for the proposition that mere differences of legal entities, such as

these two different corporate structures are not conclusive of the question of neutrality in a labor dispute. The District Judge had this to say on this question:

> "I am unable to hold that corporate ownership or insulation of legal interests between two businesses can be conclusive as to neutrality or disinterestedness in a labor dispute."

And,

> "To suggest that Project had no interest in the dispute between Ebasco and its employees is to look at the form and remain blind to substance".

Unquestionably, American Tobacco is interested in American Suppliers' labor dispute. Geographically the two Companies are so closely enmeshed as to make it almost impossible to separate them. Ownership of the two Companies is identical. The only thing that separates the two Companies is corporate entity. In the opinion of this Court, this fact does not constitute American Tobacco a neutral or a total stranger in this strike. American Tobacco rather is an ally of American Suppliers.

In the case of Whitt v. Stephens, 246 S. W. 2d 996, the Court of Appeals of Kentucky refused to consider the opening of a new drift mouth in a seam of coal by the same owner to be such a different operation as to deny the right of the union men to picket the newly opened entrance, although the union had had a contract with the owner concerning the former entrance to this seam of coal only. Thus, identity of ownership has been considered by our Court of Appeals in a labor dispute, although the question of corporate entities was not considered.

In Boyd v. Deena Artware, 239 S. W. 2d 86, our Court of Appeals held that a union could picket not only the plant of the employer, but also the area immediately adjacent to the plant upon which an independent contractor was erecting a new plant for the employer. It might be said that in that case the Court of Appeals implied that, if

the independent contractor had been seeking to enjoin the picketing and if such independent contractor could have established himself as a complete stranger to the labor dispute, the Court may have enjoined the picketing. As stated above, however, under the facts of this case, American Tobacco cannot be considered a complete stranger to the labor dispute.

It is, therefore, the opinion of the Court that the Union has the right peacefully to picket American Tobacco. Since the testimony in this case has disclosed that the picketing in this case has not been conducted in a peaceful atmosphere, an injunction should be granted but in different terms from the restraining order. The number of pickets will be limited. All violence will be enjoined. Threats of injury and reprisal will be enjoined. Use of abusive language will be enjoined. Counsel will meet with the Court to discuss the exact terms of the injunction.

CONTEMPT PROCEEDING.

Along with the hearing on the injunction, the Court also heard a rule for contempt against various members of the Union. This contempt arose out of the alleged refusal of certain members of the Union who were employed by the Bowling Green Express Company to handle merchandise for delivery to American Tobacco Company. The restraining order prohibited the members of the Union and its associates "from refusing or inducing, encouraging, or otherwise causing or arranging with, the employees of other employers, particularly common carriers, or with such employers to refuse to accept, handle, transport and deliver in accordance with their legal and contract obligations property shipped by or to plaintiff."

The seven employees of the Bowling Green Express Co. attempted to excuse their conduct in failing to make deliveries by saying that they had not "directly" been asked to handle the merchandise until the morning of the day they testified in Court. The Court is convinced that,

whether or not these seven members were directly asked to handle this goods for delivery to American Tobacco Company, all seven of them understood that they were being asked indirectly to handle the goods. The seven also professed to have had no knowledge of the restraining order that had been issued in this action. It is difficult for the Court to believe that these men had no knowledge whatsoever of the restraining order. It is true that several of them testified that they didn't know what a restraining order was, but the Court feels that these seven men knew that some sort of Court Order existed and further knew enough about that Court Order to realize that it required them to make deliveries. The effect of their claimed ignorance of the restraining order is completely lost to them by reason of the fact that on the morning of the day on which they testified in Court, after knowing that a restraining order was in existence, these men defiantly and admittedly again refused to handle the deliveries.

The Court has already dismissed the contempt rule against Paul Priddy, Stoy Decker and Marion N. Winstead, for the reason that no testimony directly involved these three men in the disobedience of the Court's order. In addition to the seven employees of the Bowling Green Express Company, Virgil Denton was also accused of contempt. He was called over the telephone by Mr. Berry of the Bowling Green Express Company and asked for assistance in getting the employees of Bowling Green Express to make the deliveries. Mr. Denton did not testify in Court but filed an affidavit explaining his conduct. The Court is not convinced from that affidavit that Mr. Denton had no part in encouraging the refusal to handle this goods for delivery to the plaintiff. He may not have directly refused or directly coerced, but he at least indirectly encouraged or induced the refusal. As Assistant Business Agent for the Union, it is believed that if Mr. Denton had acted as he should have under the circumstances the deliveries would have been made.

As it turns out, the Court is of the opinion that the restraining order was erroneous in that it went too far and in that it was based upon the theory that American Tobacco Company was a stranger to the labor dispute. Restraining orders, however, are necessarily issued in haste in order to prevent irreparable injury. Under certain circumstances restraining orders may be issued by a clerk in the absence of a judge of a court. Whether issued properly or erroneously, restraining orders must be obeyed. If improperly issued, the right place to correct the mistake is in Court. Persons affected by the order cannot take the law into their own hands and assume to disobey a court order. Consequently, it is the Court's judgment that Robert Smith, Charles Moore, Delmar Hightower, Jacob Lee, Jr., Christopher Evans, Ernest Spencer, Fred Ham and Virgil Denton are guilty of contempt and each is fined the sum of $30.00. No fine is levied against the Union in regard to these contempts for the reason that, although these persons may have acted in behalf of the Union in committing their individual contempts, there is considerable evidence that in regard to the delivery of other goods to the plaintiff the Union Officials strictly adhered to the restraining order.

STUART E. LAMPE,
Judge.

COURT OF APPEALS OF KENTUCKY

June 2, 1953

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, ET AL., - - *Appellants,*

v.

THE AMERICAN TOBACCO COMPANY, INC., - *Appellees.*

Appeal from Jefferson Circuit Court,
Chancery Branch, Second Division,
Honorable Stuart Lampe, Judge.

OPINION OF THE COURT BY JUDGE STEWART, AFFIRMING ON THE APPEAL AND ON THE CROSS-APPEAL.

Two questions are presented for determination on this appeal and cross-appeal:

1. Are the pickets around the property of the American Tobacco Company, herein referred to as "American," at 17th and Broadway Streets in Louisville, involved in primary or secondary picketing, since the strike is conducted at the same address against American Suppliers, Incorporated, herein called "Suppliers"?

2. May a driver of a common or contract carrier be compelled against his wishes by injunctive process to cross a picket line advertising a lawful strike, when the driver

NOTE:

Language appearing in the first opinion but omitted in the second opinion is in boldface type.

Language added in the second opinion is in italics.

is a member of the same union that is conducting the strike, but he is not on strike himself?

We have chosen to consider the cross-appeal, or question No. 1, first.

On March 30, 1952, Local Union No. 89 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America of the American Federation of Labor, hereinafter referred to as "Local 89" for the sake of brevity, called a strike against Suppliers and threw picket lines around four of its establishments *in Louisville*, viz.: A redrying plant at 9th and Magnolia Streets; an office with a small warehouse attached at 908 South 8th Street; a group of warehouses at 7th Street and Arcade Avenue; and a "stemmery" situated upon American's property at 17th and Broadway Streets. Suppliers is a subsidiary of American, but it is not a party to this appeal.

It is the picketing on all sides at the last mentioned location that is the bone of contention. The stemmery is situated on ground owned by American and is completely surrounded by American's cigarette factory, its auxiliary structures and its fences. American maintains that its main gates are on Broadway and that they are not and have never been used for ingress and egress of either personnel or materials of Suppliers except to some small extent. On the other hand it states that access can be had to Suppliers for all purposes from 17th Street. It is therefore perfectly practical, American argues, to set aside the entire side on Broadway for its exclusive use and thereby prevent it from becoming entangled in the labor dispute that exists only between Local 89 and Suppliers. Furthermore, American asserts it is engulfed in this controversy solely because of its corporate and geographical relations with Suppliers, but that there is not now and there has never been any affiliation between its employees and Local 89, so that it is being subjected to a secondary boycott by the conduct of the union, and that the sphere of picketing can and should be restricted to the disputants in such

a manner as to relieve it from *the* damaging results that flow therefrom. Local 89 takes the position that the picketing is primary, proper and legal. The Chancellor adopted the view of Local 89, and American has cross-appealed from the judgment in this respect. Accordingly, we must search the record to resolve whether this finding has a reasonable basis in the evidence.

We have mentioned the physical layout of the stemmery. Aside from this, American and Suppliers have an economic interdependence; or, it might be said that Suppliers is the child of American, its parent, because the latter owns all the capital stock in the former. Suppliers buys raw tobacco and puts it through a certain process at the stemmery. The tobacco is then transported from the stemmery to American's cigarette factory by means of a conveyor belt which runs from one to the other. Suppliers sells all its tobacco to American. It was brought out that American owns not only the land but the improvements employed by Suppliers in the operation of the stemmery. There was testimony that Suppliers leased the ground and the plant and paid rent to American for the use of the same; however, the terms of the lease and the amount of the rent were unknown to the local officials of either corporation. A central power plant on the property supplies steam to the facilities of both corporations, Suppliers paying for this service. The trucks of Suppliers *display* **(carry)** advertisements of "Lucky Strike," a well-known manufactured product of American. Over the entrance of another plant of Suppliers at 7th *Street* and Acade *Avenue* **(Streets)**, which is not immediately connected with this litigation, the name on the sign reads: "American Tobacco Company." At times employees of Suppliers work for American and the latter pays the former for such services. Employees of Suppliers also receive four packages of American made cigarettes as a part of their weekly compensation. If an employee of Suppliers is badly injured or becomes seriously ill, that person is sent to American's hospital for treatment. To sum up, Suppliers and American operate

as a unit, except that each in a corporate entity and each is under separate management locally.

In the light of the foregoing factual background, we are confronted with this question: Is American a neutral in the existent dispute between Suppliers and Local 89? The test to be applied in arriving at a proper conclusion on this point ma be thus stated: "An important factor in determining whether the activities of a union against an employer other than the one with which the union has a labor dispute come within the purview of the secondary boycott provision is the relationship between the two employers. If the relationship is so close that one may be regarded as the 'ally' of the other, picketing of one may be permissible during a labor dispute with the other." See 16 A. L. R., 2d, paragraph 6, page 6. However, we are not without precedent on this subject in this jurisdiction.

In the recent case of Local 181, etc. v. Broadway and Fourth Avenue Realty Company, Ky., 248 S. W. 2d 713, a strike involved a corporation which owned and operated the Brown Hotel and the Kentucky Hotel and another corporation which owned and operated the Martin Brown Building, all located in Louisville. Both corporations were, except for qualifying shares, entirely owned by Mr. Graham Brown. In *that case* **(this opinion)** in passing on a contempt proceeding, we not only treated the whole controversy as a single labor dispute but we considered Mr. Graham Brown and the two corporations as in reality one and the same. There we said:

> "Supporting the conclusion that this is in the broad sense one labor dispute, is the fact that when the strike first commenced, picketing was begun at the Martin Brown Building, as well as the two hotels, although at that time there was no claim of a labor dispute affecting the employes of the Martin Brwon Building.
>
> "In the eyes of the public, this has been a strike against Mr. Graham Brown, and the acts of vicience have been committed by persons having a labor dispute with Mr. Brown."

We think the industrial alliance between Suppliers and American is so close that both may be considered as one operation. From the standpoint of physical setup the two are so enmeshed that they cannot be split apart without doing violence to both. To suggest that American has no interest in the dispute between Suppliers and Local 89 is to look at the form and remain blind to the substance. Nor can the naked claim of corporate separability be raised as a bar to picketing the primary employer at 17th and Broadway Streets. To remove the pickets from any side of this property would be to remove them from Suppliers at that location. It cannot, therefore, be said that American is a neutral under the circumstances and that the picketing amounts to a secondary boycott at the above address. We conclude that the Chancellor correctly disposed of this issue.

Local 89 seeks by its appeal to nullify so much of the injunction as requires a driver of a common or contract carrier to cross against his will a picket line where a strike is in progress. It so happens in this instance that the carrier employees are members of the same union as those conducting the strike against Suppliers. It should be emphasized, however, that they refuse to handle freight for American while remaining in the service of their employer.

The rule of law that common carriers and their employees must serve all members of the public without discrimination is firmly established in Kentucky and, so far as we can find, in all the states. Its origin goes far back into the common law. Section 196 of the Constitution of Kentucky embodies the principle in this language: "Transportation of freight and passengers by railroad, steamboat or other common carrier, shall be so regulated, by general law, as to prevent unjust discrimination. No common carrier shall be permitted to contract for relief from its common law liability." Subsections 1 and 2 of KRS 281.685 read in part that no common or contract carrier shall "subject any person to any unreasonable discrimination." KRS 281.990(1) stipulates that any person who "violates, or

causes, aids or abets any violation of, any of the provisions of this chapter," which includes KRS 281.685(1) and (2), "shall be fined not less than fifteen dollars nor more than two hundred dollars, or imprisoned for not more than thirty days or both."

(The foregoing doctrine is set forth at length). *See also* 9 Am. Jur., Carriers, section 286, pages 607-608, and in 13 C. J. S., Carriers, section 27, pages 61-62.

In Burlington Transp. Co. v. Hathaway (Iowa, 1943), 12 N. W. 2d 167, a suit was brought by certain common carriers as plaintiffs against the teamsters, chauffeurs, warehousemen and helpers union and its business agents as defendants to enjoin the latter from requiring employees of the union to refuse to handle the goods of John Blaul's Sons Company, a wholesale grocery company in Burlington, Iowa, which the union was attempting to organize. A picket line had been thrown around the grocery company and the employees of the union refused to transport freight for the grocery company. The Iowa statute as to non-discrimination by carriers is similar to Kentucky's. The substance of the court's decision is as follows:

> "When the plaintiffs obtained their permits to operate as common carriers, they undertook the duty to transport the freight which the public tendered to them for transportation. The failure to carry out this duty to transport would not be excused by showing that its employees refused to obey the employers' order. See Chicago B. & Q. R. Co. v. Burlington, C. R. & N. Ry. Co., et al., C. C., 34 F. 481, and Consolidated Freight Lines, Inc., et al., v. Department of Public Service, et al., 200 Wash. 659, 94 P. 2d 484, 485. In the last cited case a strike of laundry workers at the Davenport Hotel in Spokane resulted in a picket line around that hotel. Certain common carrier truck lines, who had been serving the hotel in the capacity of picking up freight or baggage and delivering it anywhere in the State of Washington or in the channels of interstate commerce, refused to send their trucks through the picket line at the hotel because the local

manager of the teamsters' union threatened to call a strike of the carriers' drivers if they were permitted to go through the picket line. The hotel filed a complaint with the Department of Public Service against the carriers for the cancellation of their permits as common carriers. This resulted in an order suspending temporarily the permits under which the carriers operated. Upon appeal the action of the Commission was affirmed, the Supreme Court of Washington stating: 'The question then arises whether the appellants were excused by reason of the law. They being common carriers, it was their duty, under the facts and circumstances of this case, to send their trucks through the picket line. 13 C. J. S., Carriers, p. 407,sec. 202; Moore on Carriers, 2d Ed., Vol. 1, p. 124; Chicago, B. & Q. R. Co. v. Burlington, C. R. & N. Ry. Co., C. C., 34 F. 481; Burgess Bros. Co. v. Stewart, 112 Misc. 347, 184 N. Y. S. 199.'

* * * * * * * *

"From the above it is clear that if the plaintiffs were to do that which the union sought to compel them to do, namely, not handle the Blaul merchandise, they would be doing an act prohibited by the common law and the statutory law of this state and an act that could subject them to criminal prosecution.

* * * * * * * *

"There was no labor dispute between plaintiffs and their employees or between plaintiffs and the defendant union. The union cannot concertedly exert, in aid of their labor dispute with Blaul, any economic pressure to compel these plaintiffs to do that which the law and public policy forbid. The injunction was rightly issued."

These cases support the rule laid down in the Hathaway case: Pacific Gamble Robinson Co. v. Minneapolis & St. Louis R. Co., (D. C. Minn., 1952) 105 F. Supp. 794; Northwestern Pacific R. Co. v. Lumber & Sawmill Workers Union, etc., (Cal., 1948) 189 Pac. 2d 277; Turner v. Zanes, (Tex., 1947) 206 S. W. 2d 144.

Counsel for Local 89 admit that the Hathaway case correctly sets forth the law on the issue raised by the ap-

peal as of the date it was decided, namely, in 1943, but they insist that the Labor-Management Relations Act of 1947, commonly called the Taft-Hartley Act, 61 Stat. 136 (1947), 29 U. S. C. A., Sec. 151 et seq. (Supp., 1952), makes the question under discussion one exclusively controlled by **(the above)** *this* enactment. To fortify this position, reliance is had upon this part of 29 U. S. C. A., Sec. 158, also known as 8 (b) (4) (D), *of the Act*, which is as follows: "* * * provided, that nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer) if the employees of such employer are engaged in a strike ratified or approved by representative of such employee**(s)** whom such employer is required to recognize under this sub-chapter."

(We do not agree with this line of reasoning. Section 8 (b) (4) (A), (B), (C) and (D) of the Labor-Management Relations Act of 1947 was clearly intended to outlaw only a secondary boycott, and such is not involved in the issue under consideration. See Picketing-Free Speech, Tanenhaus, Cornell Law Quarterly, Fall, 1952, Vol. 38, No. 1, pages 1 to 50; and see also the statement of Senator Taft in 93 Cong. Rec., page 4198. Nor does the above quoted provision purport to make lawful any act which aside from the statute in question is unlawful.) The appeal **(here)** involves the refusal of employees of *common or contract* carriers who *are not on strike but who* happen to belong to Local 89, the bargaining representative of Suppliers' employees, to transport the merchandise of American through the picket line at 17th and Broadway Streets, and this disobedience is not complained of as an unfair labor practice but as a violation of the common law, *the statutory law and the Constitution of Kentucky.* **(the constitutional law and the statutory law of Kentucky.) (More than that)**, *Aside from this, as we have shown*, the illegal conduct of the employees could subject them to criminal prosecution. *We find nothing in the provisions of the above Act or in the decisions of the Supreme Court of the*

United States construing it that makes such conduct legal when from time immemorial the several states have branded it as illegal. Furthermore, the Supreme Court has taken the position that federal jurisdiction cannot be invoked to protect a course of action, such as that in this case, that would be in conflict with the declared public policy of a state. See Local Union No. 10 v. Graham, 344 U. S. 811, and the cases cited therein. It follows that the portion of the injunction requiring performance of the duty to carry American's goods in no way impairs the right to strike, the right to picket or any other right guaranteed by the federal law or the Constitution of the United States *but that the order does, on the contrary, enforce obedience to the law and Constitution of the Commonwealth and, as a consequence, it was proper.*

Finally, the employees of the carriers rely upon a provision of the agreement between themselves and their employers covering the period from February 1, 1952, to January 31, 1955, to the effect that it shall not be a violation of their contract or a cause for discharge to refuse to go through the picket line of a union or to refuse to handle unfair goods. They insist that this stipulation excuses them from serving American. The legal duty of a common carrier to handle the merchandise of a shipper without discrimination existed long before the contract came into being, and, by like token, employees of *such* **(common)** carriers, as long as they voluntarily remain in the hire of their employer, do not have the lawful right to withhold their services from a particular customer who deals with their employer. *Here* **(Where)** the common carrier and its employees seek by a contractual provision to avoid the responsibility imposed by *a* statute, *which implements a constitutional provision, and we hold that* such a contractual stipulation is void. **(Such is the case here.)**

The question of whether a contempt has been committed is left for the Chancellor's determination. Our reason for this ruling is that the contempt, if any, is continuous in its nature and it should not be handled piecemeal. Be-

sides, the Chancellor is on the ground, is familiar with the background of this suit and is in a better position to hear the evidence; therefore, this phase of the case can be more expeditiously handled for all concerned in the lower court.

It appears to us that an emergency exists in this case and a mandate shall issue forthwith without prejudice to the right to file a petition for a rehearing.

The judgment is affirmed on the appeal and on the cross-appeal.

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APPENDIX B.

Constitution of Kentucky,

Section 196:

> *"Regulation of common carriers; no relief from common law liability.* Transportation of freight and passengers by railroad, steamboat or other common carrier, shall be so regulated, by general law, as to prevent unjust discrimination. No common carrier shall be permitted to contract for relief from its common law liability."

Kentucky Revised Statutes,

Chapter 281,
Section 281.685:

> *"Adherence to rates, fares, charges, and schedules; discrimination.* (1) No common carrier shall charge, demand, collect or receive a greater, less or different compensation for the transportation of persons or property or for any service in connection therewith, than the rates, fares and charges specified in its tariffs and classifications filed with the department and in effect at the time; nor shall any common carrier refund or remit any part of the rates, fares or charges so specified, or make or give any unreasonable preference or advantage to any persons, or subject any person to any unreasonable discrimination.
>
> "(2) No contract carrier shall charge, demand, collect or receive a greater, less or different compensation for the transportation of persons or property or for any service in connection therewith than that contained in the contract required to be filed with the department and in effect at the time; nor shall any contract carrier refund or remit any part of the charges specified in the contract, or make or give any unreasonable preference or advantage to any person, or subject any person to any unreasonable discrimination."

Section 281.990:

"*Penalties.* (1) Any person who violates, or causes, aids or abets any violation of, any of the provisions of this chapter or any order, rule or regulation lawfully issued pursuant to authority granted by this chapter, or who knowingly makes any false or erroneous statement, report or representation to the Department of Motor Transportation with respect to any matter placed under the jurisdiction of the department by this chapter, or who knowingly makes any false entry in the accounts or records required to be kept pursuant to the authority granted by this chapter, or who knowingly fails to keep or knowingly destroys or mutilates, any such accounts or records, shall be fined not less than fifteen dollars nor more than two hundred dollars, or imprisoned for not more than thirty days, or both. Every device to evade or to prevent the application of any provision of this chapter, or any lawful order, rule or regulation of the department issued pursuant thereto, shall constitute a violation thereof."

49 USC Sec. 304 (1) and (2):

"*Powers and duties of commission*—(a) *Powers and duties generally.*

"It shall be the duty of the Commission—

"(1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(2) To regulate contract carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and

maximum hours of service of employees, and safety of operation and equipment."

29 USC Sec. 104 (a):

"*Enumeration of specific acts not subject to restraining orders or injunctions.*

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment";

29 USC Sec. 158(b)(4):

"It shall be an unfair labor practice for a labor organization or its agents—

"(4) To engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representa-

MAR 15 1955
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1954

No. 186

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION No. 89, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. of L., an Unincorporated Labor Union; PAUL W. PRIDDY, JOSEPH BURRELL, STOY DECKER, WILLARD MARPLES, JAMES MALLORY, ALMA HARPER, Individually, and as Representatives of a Class Consisting of Members of General Drivers, Warehousemen and Helpers, Local Union No. 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an Unincorporated Labor Union, - Petitioners,

versus

THE AMERICAN TOBACCO COMPANY, INC., - Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY.

BRIEF FOR RESPONDENT.

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IN THE

Supreme Court of the United States

October Term, 1954

No. 186

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION No. 89, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. of L., an Unincorporated Labor Union; PAUL W. PRIDDY, JOSEPH BURRELL, STOY DECKER, WILLARD MARPLES, JAMES MALLORY, ALMA HARPER, Individually, and as Representatives of a Class Consisting of Members of General Drivers, Warehousemen and Helpers, Local Union No. 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an Unincorporated Labor Union, - Petitioners,

versus

THE AMERICAN TOBACCO COMPANY, INC., - Respondent.

On Writ of Certiorari to the Court of Appeals of the Commonwealth of Kentucky.

BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The opinions of the Jefferson Circuit Court, Chancery Branch, are unreported. The memorandum opin-

ion of April 23, 1953, appears in the Record on pages 34-5. The opinion of April 22, 1953, appears in the Record at pages 22-33. The opinion of the Court of Appeals of Kentucky, as originally handed down, is reported in 258 S. W. 2d 903. The opinion as modified on rehearing is reported in 264 S. W. 2d 250. For the convenience of this Court, we have printed these opinions in Appendix in a consolidated form, in order to show the modifications made to the first opinion by the second.

STATUTES INVOLVED.

In addition to the sections of the Interstate Commerce Act (Motor Carrier Act) cited by petitioners, respondent cites Sections 9, 22 and 204(1) thereof, 49 USC, Sections 9, 22 and 304(1); respondent also cites Section 4(a) and (i) of the Norris LaGuardia Act, 29 USC 104(a), and Kentucky Revised Statutes Section 281.990.

STATEMENT OF THE CASE.

Respondent, The American Tobacco Company, Inc., owns and operates a factory in Louisville, Kentucky, where it manufactures cigarettes. A wholly-owned subsidiary of respondent, American Suppliers, Inc., occupies space at the center of respondent's Louisville property. American Suppliers is engaged in the business of purchasing, curing and processing leaf tobacco.

Petitioners, General Drivers, Warehousemen and Helpers Local Union No. 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., are the certified collective bargaining agent for certain employees of American Suppliers. They are also the collective bargaining agent for the employees of practically all of the common carriers by motor vehicle in the Louisville area.

A strike of American Suppliers' employees, accompanied by picketing of the Respondent's factory, began on March 30, 1953. Respondent had approximately 1,500 employees at this plant, of whom a substantial majority were Union members. Nearly all of Respondent's employees continued at their work notwithstanding the necessity of crossing a picket line. However, members of Local 89 very shortly began to apply every type of pressure at their command in an effort to shut down Respondent's operation, including mass picketing, violence, threats, damage to property, blocking access to the plant, and refusal to permit common carriers to transport Respondent's shipments.

The Case Presented to the Kentucky Courts.

On April 4, 1953, Respondent sought an injunction against petitioners in the Jefferson Circuit Court, Chancery Division, because of petitioners' acts of violence and also because petitioners were picketing Respondent's entire block. Respondent alleged that it had no connection with the labor dispute between American Suppliers and petitioners and that the picketing should be restricted to such entrances to the property as the employees of American Suppliers habitually used. Respondent also sought relief from the interference with shipments to and from its plant which was being caused by members of petitioners who were employees of common carriers.

The petition filed by Respondent, on April 4, 1953, sets forth in numbered paragraphs fifteen classes of illegal acts committed by Local 89 and its members, of which the refusal to transport shipments was No. 13 (4-6).* Relief from all these unlawful activities was prayed, the relief as to interference with transportation being only one of five specific prayers (7, 8). None of these activities were described in the petition as an unfair labor practice. They were all alleged to be "in violation of the public policy and the law of the State of Kentucky" (4). The trial court held that they were a wrong against Respondent and "a violation of Kentucky law in a field not covered exclusively

*Numbers in parentheses without a prefix refer to pages of the record. Numbers prefixed with "P. Br." refer to pages of the brief of petitioners. Numbers prefixed with "NLRB" refer to pages of the brief for the National Labor Relations Board as *amicus curiae*.

by the Federal Act" (26). The Court of Appeals, noting that "this disobedience is not complained of as an unfair labor practice, but as a violation of the common law, the statutory law and the Constitution of Kentucky" (102), affirmed.

The Relief Granted by the Trial Court.

On April 6, 1953, the court granted a restraining order which forbade causing or threatening injury to persons or property of the employees of Respondent, or to its own property, and from using abusive, vile, profane or threatening language to Respondent's employees or others seeking to enter or leave its premises. Prevention of the illegal acts so forbidden was vital to Respondent's continuing operations. The scope of relief from such acts was continued in slightly narrowed form by the permanent injunction. Petitioners took no appeal from these portions of the permanent injunction and they are not before this Court. However, in view of the questions as to the original jurisdiction of the Kentucky court, it is material that these illegal acts, as to which the state court unquestionably had jurisdiction, and from which the Union took no appeal, were an integral and vital part of the case presented to the Kentucky court. The order requiring members of Local 89 to continue to transport Respondent's shipments was only a portion of the relief which it prayed and was granted. In addition to enjoining members of petitioners who were employees of common carriers from discriminating against Respondent by

their refusal to pick up and deliver Respondent's shipments, the court also enjoined picketing at the main entrance to Respondent's premises on one side of the block, but allowed picketing on the other three sides at entrances which the employees of American Suppliers normally used (36).

The court held a hearing eight days after its restraining order, and after taking proof granted a permanent injunction. The court found (22-31) that Respondent and American Suppliers were so closely related both geographically and as to ownership that they should be considered as one. It thereupon rescinded its ban against the picketing of Respondent's main entrance and allowed pickets on all four sides of the block. The next day the court also held (34) that the permanent injunction should also restrain any unlawful discrimination by members of petitioners who were employees of common carriers against Respondent.

No appeal was taken by petitioners from the portions of the permanent injunction relating to illegal acts other than the truck drivers' refusal to serve Respondent, and no other issues are before this Court.

The Factual Issues.

The assumption in the brief of the National Labor Relations Board as *amicus curiae* that the Union directed its drivers not to serve Respondent is contrary to the evidence. The officers of Local 89 testified positively that they had instructed the members to perform

their duties, and the great weight of the evidence was to the effect that the refusal of each truck driver was a result of his individual decision (19, 60, 61, 62-63, 65, 67, 68). While the Trial Court, in passing upon the refusal of the drivers of one carrier found as to one agent that he, "indirectly encouraged or induced the refusal" (33), it absolved Local 89 and its other officers from doing so (40).*

The record also shows that what refusals there were to enter upon Respondent's premises did not take place when there was any picket line at Respondent's main entrance (52, 67, 60), but while the preliminary restraining order was in force and kept pickets from Respondent's main entrance. This entrance was the one which common carriers normally used in picking up and delivering Respondent's shipments.

When the employees of the carriers, who were also members of Local 89, refused to handle Respondent's goods, the carriers repeatedly demanded of their employees that they handle the goods (12, 32, 38, 42-5, 51, 56-7, 64-8), and their managers assisted Respondent with evidence (37, 42).

There was no showing that the carriers' drivers would encounter any physical danger in crossing a picket line set up by members of their own union.

Petitioners did not argue that the refusal of the employees of the common carriers to serve Respondent

*A number of contempt rules were subsequently issued in connection with similar refusals, and in no case was Local 89 or any of its officers held to have violated the injunction. The record for the Court of Appeals was made up before the Trial Court's action on these rules, so the record here does not reflect it.

was reasonable or excusable or not discriminatory; instead they argued that the Kentucky courts had neither jurisdiction nor power to interfere with the refusal, because of the provisions of the Labor Management Relations Act and the contract between the carriers and their employees.

The Decision of the Kentucky Court of Appeals.

Petitioners appealed to the Court of Appeals of Kentucky from the injunction, and Respondent cross-appealed the holding that it and American Suppliers were to be treated as one. The Court of Appeals affirmed the judgment on both appeals. Petitioners moved for a rehearing. While their original ground of appeal had been that the Labor Management Relations Act had deprived the Kentucky courts of jurisdiction to pass upon the refusal of the employees of the common carriers to cross a picket line, their petition for rehearing argued for the first time that the Interstate Commerce Commission had jurisdiction to determine the case.

The Court of Appeals denied a rehearing on February 2, 1954.

Petitioners' Statement of the Case (P. Br. 12) quotes portions of one paragraph from the Court's Opinion relating to refusals to handle Respondent's shipments, but Respondent believes that the entire paragraph shows more clearly the rationale of the decision. It appears at page 102 of the Record, and the portions italicized were omitted by petitioners:

"The appeal involves the refusal of employees of common or contract carriers who are not on strike but who happen to belong to Local 89, the bargaining representative of Suppliers' employees to transport the merchandise of American through the picket line at 17th and Broadway Streets, and this disobedience is not complained of as an unfair labor practice but as a violation of the common law, the statutory law and the Constitution of Kentucky. Aside from this, as we have shown, the illegal conduct of the employees could subject them to criminal prosecution. *We find nothing in the provisions of the above Act or in the decisions of the Supreme Court of the United States construing it that makes such conduct legal when from time immemorial the several states have branded it as illegal. Furthermore, the Supreme Court has taken the position that federal jurisdiction cannot be invoked to protect a course of action, such as that in this case, that would be in conflict with the declared public policy of a state. See Local Union No. 10* v. *Graham,* 344 U. S. 811, *and the cases cited therein.* It follows that the portion of the injunction requiring performance of the duty to carry American's goods in no way impairs the right to strike, the right to picket or any other right guaranteed by the federal law or the Constitution of the United States *but that the order does, on the contrary, enforce obedience to the law and Constitution of the Commonwealth and, as a consequence, it was proper."*

This Court granted certiorari on October 14, 1954. 348 U. S. 813.

SUMMARY OF ARGUMENT.

The courts below enjoined the refusals of employees of certain common carriers to handle respondent's shipments. These refusals have been referred to as refusals to cross picket lines but an examination of the record in the case reveals that the drivers' refusals to serve that appear therein did not occur when there was any picket line at respondent's entrance, and no question is presented as to the obligation of any persons other than carriers' employees to cross picket lines. These refusals constituted illegal discrimination under the law governing common carriers as it is generally understood throughout the United States.

The Labor Management Relations Act does not deprive the courts of Kentucky of jurisdiction to enjoin these refusals. Jurisdiction over these refusals is not in the National Labor Relations Board. The proviso to Section 8(b) of the Labor Management Relations Act prevents these refusals from being regarded as unfair labor practices under the earlier provisions of Section 8(b). Section 8(b) is also limited to acts done by "a labor organization or its agents," and the refusals here were shown to be spontaneous, and contrary to instructions of the union (19, 60, 62). The National Labor Relations Board thus has no jurisdiction over them on this ground, nor do the federal courts, since Section 10 of the Labor Management Relations Act authorizes the National Labor Relations Board to seek injunctive relief only where unfair practices under Section 8 have occurred. At the same

time, the proviso to Section 8(b) does not supersede state law governing common carriers; the proviso to Section 8(b) is concerned only with the power of the National Labor Relations Board.

The refusals were not protected under Section 7 of the Labor Management Relations Act. A practice not unlawful under Section 8(b) is not necessarily entitled to protection under Section 7, and certainly not when it is otherwise unlawful. The refusals were not protected by the employees' right to strike under Section 13, since they continued on their jobs and served other shippers, disobeying their employers only when respondent's goods were to be carried. A partial strike is not a protected activity; furthermore the injunction below expressly preserved the employees' right to strike or to leave their employment.

The refusals, being neither protected by the Labor Management Relations Act nor subject to any remedy given by the Act, were in the field which is left open to state regulation. The Kentucky courts properly exercised their power to prevent irreparable injury by enjoining this form of discrimination against respondent, while at the time time respecting the rights of the drivers to strike or to leave their jobs. Inasmuch as the discrimination against respondent was illegal, the injunction below was properly extended to prohibit inducement to commit acts of discrimination.

The provision in the contract between the common carriers and their employees allowing the employees to refuse to cross picket lines is ineffective against the law of Kentucky. Private individuals may not by

contract impair a state's enforcement of its law and public policy. Neither is this provision protected by Section 7 or the proviso to Section 8(b) of the Labor Management Relations Act, in so far as it purports to excuse the employees of common carriers from performing their duties.

The question of the jurisdiction of the Interstate Commerce Commission was not timely presented in the courts below. It first appeared in the petition for rehearing before the Court of Appeals of Kentucky. It was not decided on the merits, since Kentucky law does not require the Court of Appeals to pass upon a question not raised in the trial court. The Court of Appeals did not discuss the question in denying the petition for rehearing. The certificates of a justice of the Court of Appeals, appearing in the record before this Court, are insufficient to raise the federal question.

If, however, the question of the jurisdiction of the Interstate Commerce Commission is properly before the court, it has no substantive merit. There was no necessity for primary resort to the Interstate Commerce Commission against the discrimination which the Kentucky courts enjoined. The special competence in transportation matters which the Interstate Commerce Commission possesses was not necessary to decide the question of discrimination, since only a question of law was presented—the illegality of the refusal to serve respondent—and this question is properly cognizable in the courts.

Furthermore, the Interstate Commerce Commission has jurisdiction, in a situation like that before the

court, only over common carriers and not over their employees. It could not grant relief to respondent against discrimination practiced by members of petitioners who are employees of common carriers.

Respondent, which was suffering injury for which neither the federal courts nor the National Labor Relations Board nor the Interstate Commerce Commission could grant relief, properly sought and obtained relief in the courts of Kentucky.

ARGUMENT.

POINT I.

The Refusal by Employees of a Common Carrier to Pick Up and Deliver Shipments Is Not a Right Protected by the Labor Management Relations Act, and the National Labor Relations Board Does Not Have Jurisdiction Over It.

A. THE SCOPE OF THE INJUNCTION BELOW.

The portion of the permanent injunction which petitioners attack before this Court is brief, and analysis shows that the trial judge carefully chose its wording to make sure that it did not impair any federally-protected rights of the affected employees or infringe upon the jurisdiction of the National Labor Relations Board or the Interstate Commerce Commission.

It enjoins the Union, its members, and their confederates and associates:

> "4. From causing, aiding or abetting any common carrier or contract carrier unreasonably to discriminate against plaintiff by refusing while remaining an employee thereof, or inducing, encouraging, coercing or otherwise causing or arranging with common or contract carriers or any persons connected therewith to refuse to accept, handle, transport, and deliver, in accordance with their legal and contract obligations, property shipped by or to plaintiff, so long as property is being handled, transported and delivered by or to other customers of such contract or common carriers" (36-7).

The primary act enjoined is the refusal of the carriers' employees to perform their legal duties, and the petitioners' argument is principally addressed to this portion of the injunction rather than to the secondary portion which forbids "inducing, encouraging, coercing * * *" the refusal. Since the court may properly enjoin accomplishment by indirection if it may enjoin the direct act, the exact terms and limitations of the primary portion of the injunction become the controlling issue in this case. As to this, it will be noted that it does not apply to carriers, nor to the union as an entity, nor to the striking employees of respondent's subsidiary, but only to a limited portion of petitioners' members who are employees of common and contract carriers. Thus it applies only to those who are subject to Kentucky Revised Statutes, Section 281.685*; the employees of non-carriers are not affected. It therefore renders inapplicable such cases as *Bus Employees* v. *Winconsin Board,* 340 U. S. 383 (1951); *Globe Wireless, Ltd.,* 88 N. L. R. B. 1262 (1950), enforced, 193 F. 2d 748 (9th Cir., 1951); and *Hazen & Jaeger Funeral Home,* 95 N. L. R. B. 1034 (1951), enforced, 203 F. 2d 807 (9th Cir., 1953), which petitioners cite, since in all those cases there was an interference with the right of those engaged in a labor dispute with their employers to strike or picket.

The provision of the injunction applies to the employees of carriers only "while remaining an employee," so it does not impair their right to leave their employment.

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*P Br. 102.

It applies to those employees only "so long as property is being handled, transported and delivered by or to other customers," so it does not impair their right to strike. Again the cases mentioned above which petitioners cite are inapplicable, since they all interfered with the right to strike.

It only forbids those employees to refuse to handle goods "in accordance with their legal and contract obligations" and then only when the result is to cause the carriers "unreasonably to discriminate," *i. e.*, to violate the Constitution and statutes and common law of Kentucky. Ky. Rev. Stat., § 281.685.

It applies only to "property shipped by or to plaintiff" (Respondent). Respondent's subsidiary, American Suppliers, closed down its Louisville plants completely during the strike against it. No shipments to or from those plants, and no picket line other than that around respondent's premises, were ever in question.

The provision of the injunction does not apply to picketing or affect the right to picket. Picketing was expressly permitted by another paragraph of the injunction (36).

In short, the provision does not require any member of petitioners to perform service without his consent. He is free to strike or leave his employment at any time. But if he chooses to work for a carrier, he is obligated to obey the law governing carriers so long as he does so.

The court did not, as petitioners suggest, take "the view that a sympathy strike by employees of common or contract carriers was permissible" (P. Br. 23),

thereby inviting a violation of Section 8(b)(4)(A) of the Labor Management Relations Act. The Court of Appeals merely recognized that any individual driver who did not want to cross the picket line had a right to quit or strike, as did the Wisconsin Employment Relations Board in its order which this Court upheld in *Int'l Union, U. A. W. A.* v. *Wis. Employment Relations Board,* 336 U. S. 245, 250 (1949).

B. THE REFUSAL OF THE CARRIERS' EMPLOYEES TO SERVE RESPONDENT WAS A CLEAR VIOLATION OF THE LAW OF CARRIERS.

Petitioners and the National Labor Relations Board consistently refer to the law requiring common carriers and their employees to serve all shippers without unreasonable discrimination as "Kentucky" law. This is accurate as far as it goes, but it contains an invidious implication that the rule applied below was a peculiar piece of local legislation. While a strong argument might be made that a state may enact any peculiar legislation that it chooses, as long as it does not clearly conflict with "the supreme Law of the Land," U. S. Const., Art. VI, Respondent need not make that argument here.

The law which Kentucky seeks to enforce is neither local nor peculiar. While it is expressed in her statutes, pursuant to a mandate in her Constitution, it is basically a rule of her common law which does not differ from the common law applied in other jurisdictions of the United States. Of it the Court of Appeals of Kentucky said (99):

"The rule of law that common carriers and their employees must serve all members of the public without discrimination is firmly established in Kentucky and, so far as we can find, in all the states. Its origin goes far back into the common law. Section 196 of the Constitution of Kentucky embodies the principle in this language: 'Transportation of freight and passengers by railroad, steamboat or other common carrier, shall be so regulated, by general law, as to prevent unjust discrimination. No common carrier shall be permitted to contract for relief from its common law liability.' Subsection 1 and 2 of KRS 281.685 read in part that no common or contract carrier shall 'subject any person to any unreasonable discrimination.' KRS 281.990(1) stipulates that any person who 'violates, or causes, aids or abets any violation of, any of the provisions of this chapter,' which includes KRS 281.685(1) and (2), 'shall be fined not less than fifteen dollars nor more than two hundred dollars, or imprisoned for not more than thirty days or both.'

"See also 9 Am. Jur., Carriers, section 286, pages 607-608, and in 13 C. J. S., Carriers, section 27, pages 61-72."

The Kentucky court was applying one part of a consistent body of rules designed to insure that common carriers and their employees, as long as they hold themselves out to be such, perform the services required of them. This requirement of service comes most sharply to the fore when there are labor disputes. Even here the carriers and their employees have not

been exonerated from performing their duties. This is made clear by three types of cases.

1. Cases where employers engaged in a labor dispute have obtained injunctions to compel carriers or their employees, or both, to perform their duties: *Pacific Gamble Robinson Co.* v. *Minn. & St. L. Ry.*, 83 F. Supp. 860 (D. Minn., 1949), appeal dismissed, 181 F. 2d 812 (8th Cir., 1950); *Burgess Bros. Co.* v. *Stewart*, 112 Misc. 347, 184 N. Y. Supp. 199 (Sup. Ct.), aff'd on other grounds, 194 App. Div. 913, 185 N. Y. Supp. 85 (2d Dep't, 1920); *Burgess Bros. Co.* v. *Stewart*, 114 Misc. 673, 187 N. Y. Supp. 873 (Sup. Ct., 1921); *Best Motor Lines* v. *International Brotherhood*, 150 Tex. 95, 237 S. W. 2d 589 (1951); *Truck Drivers* v. *Whitfield Transp., Inc.*, 259 S. W. 2d 947 (Tex. Civ. App., 1953); *Turner* v. *Zanes*, 206 S. W. 2d 144 (Tex. Civ. App., 1947); *Cf. Buyer* v. *Guillan*, 271 Fed. 65 (2d Cir., 1921).

2. Cases where carriers who have failed to perform their duties to a customer involved in a labor dispute have been held liable in damages or subject to administrative penalties: *Pacific Gamble Robinson Co.* v. *Minn. & St. L. Ry.*, 105 F. Supp. 794 (D. Minn., 1952), aff'd as modified, 215 F. 2d 126 (8th Cir., 1954); *Montgomery Ward & Co.* v. *Northern Pac. Terminal Co.*, 23 CCH Lab. Cases, ¶67,713, 32 L. R. R. M. 2386 (D. Ore., 1953); *Consolidated Freight Lines, Inc.* v. *Dept. of Public Service*, 200 Wash. 659, 94 P. 2d 484 (1939).

3. Cases where carriers have been held entitled to injunctive relief against their employees to compel

them to perform their duties as long as they continued working for the carrier, or against strikers to compel them not to interfere with the employees' performance of their duties: *Toledo, A. A. & N. M. Ry.* v. *Pennsylvania Co.*, 54 Fed. 730 (C. C. N. D. Ohio, 1893); *Toledo, A. A. & N. M. Ry.* v. *Pennsylvania Co.*, 54 Fed. 746 (C. C. N. D. Ohio), appeal dismissed *sub nom*; *In Re Lennon*, 150 U. S. 393 (1893); *Erie R.* v. *Local 1286, International Longshoremen's Ass'n*, 117 F. Supp. 157 (W. D. N. Y., 1953); *Northwestern Pac. R.* v. *Lumber & Sawmill Workers' Union*, 31 Cal. 2d 441, 189 P. 2d 277, 1948); *Terminal R. Ass'n of St. Louis* v. *International Ass'n of Machinists*, 333 Ill. App. 288, 77 N. E. 2d 448 (4th Dist., 1948); *Burlington Transp. Co.* v. *Hathaway*, 234 Iowa 135, 12 N. W. 2d 167 (1943); see *New York, N. H. & H. R. R.* v. *Jenkins*, 122 N. E. 2d 759 (Mass. 1954).

C. THE REFUSAL TO PICK UP OR DELIVER SHIPMENTS IS NOT AN UNFAIR LABOR PRACTICE UNDER THE PROVISO TO SECTION 8(b) OF THE LABOR MANAGEMENT RELATIONS ACT AND THE NATIONAL LABOR RELATIONS BOARD DOES NOT HAVE JURISDICTION OVER IT.

Congress has defined unfair labor practices in Section 8 of the Labor Management Relations Act and has empowered the National Labor Relations Board in Section 10(a) to prevent any person from engaging in any unfair labor practice listed in Section 8 and affecting commerce. Section 8(a) is concerned with unfair labor practices committed by employers, and Section 8(b) with unfair labor practices committed "by a labor organization or its agents."

Inasmuch as the weight of the evidence is that the refusals to serve respondent were refusals of independent employees that were not sanctioned by a labor union or its agents, the National Labor Relations Board at the outset does not have jurisdiction. In addition to this, however, Section 8(b) contains the following proviso:

> "Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act."

Under this proviso, refusal to cross a picket line under the circumstances stated in it is expressly excluded from the unfair labor practices which the National Labor Relations Board may prevent a union or its agents from committing.

The holding of the Court of Appeals of Kentucky in this case that respondent and its subsidiary "operate as a unit" and that their alliance "is so close that both may be considered as one operation" (97-98), makes this proviso apply. The Board therefore was not authorized to take action with respect to the refusal of the truck drivers to cross the picket line.

By this proviso nothing contained in subsection 8(b) "shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer * * *." These are not appropriate words to

guarantee a right. Had Congress intended a guarantee, its choice of words in Section 7—"Employees shall have the right * * *"—shows that it knew how to do so. The wording of the proviso indicates an entirely different intention. Does this proviso supersede any state law to the contrary which does make such a refusal unlawful?

It does not advance the argument much to assert that Congress has the power in regulating commerce through the Labor Management Relations Act to supersede state law. The question still remains whether it has done so. As this Court said in *Garner* v. *Teamsters, Chauffeurs and Helpers Local Union No. 776*, 346 U. S. 485, 488 (1953):

> "The National Labor Management Relations Act, as we have before pointed out, leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible."

As a pure matter of statutory construction, it is improper to read Section 8 as referring to anything more than a definition of the rights to be effectuated by the National Labor Relations Board; it is incongruous to assert that, by a proviso attached to its definitions, Congress intended to abrogate the corpus of state law regulating common carriers.

The legislative history supports the view that Congress was concerned solely with matters to come before the National Labor Relations Board. S. Rep. No. 105, 80th Cong., 1st Sess. 23 (1947):

> "Attached to section 8(b)(4) is a proviso clause, which makes it clear that it shall not be unlawful for any person to refuse to enter upon the premises of any employer (other than his own), if the employees of that employer are engaged in a strike authorized by a union entitled to exclusive recognition. In other words, refusing to cross a picket line or otherwise refusing to engage in strikebreaking activities would not be deemed an unfair labor practice unless the strike is a 'wildcat' strike by a minority group."

The Report does not say that refusal to cross a picket line should be exempt from all control, whether federal or state; it merely states that refusal to cross a picket line would not be deemed an unfair labor practice and so would not come within the cognizance of the National Labor Relations Board.*

If the scope of the proviso to Section 8(b) were as broad as petitioners contend it is, then the three lines of cases stated on pages 19 and 20 above governing the duties of common carriers and their employees would be overruled; but it is erroneous to contend that Congress has swept away all these cases by means of a proviso to a statute governing the unfair labor practices of labor organizations.

In interpreting the Labor Management Relations Act this Court has not lightly attributed to Congress an intention to override State law. *Allen-Bradley Local No. 1111* v. *Wisconsin Employment Relations*

*For a fuller discussion of the legislative history of this proviso, see Tower, *The Puzzling Proviso*, 1 Labor L. J. 1019, 1021-2 (1950).

Board, 315 U. S. 740, 749 (1942), cited with approval in *International Union, United Automobile Workers of America* v. *Wisconsin Employment Relations Board,* 336 U. S. 245, 252-3 (1949).

In the *Allen-Bradley* case this Court affirmed the right of a state to enjoin mass picketing accompanied by threats and violence. This Court recognized that "a State was exercising its historic powers over such traditionally local matters as public safety and order and the use of streets and highways," and said, "We will not lightly infer that Congress by the mere passage of a federal Act has impaired the traditional sovereignty of the several States in that regard." 315 U. S. at 749.

D. THE REFUSAL TO PICK UP OR DELIVER SHIPMENTS IS NOT A CONCERTED ACTIVITY PROTECTED BY SECTION 7 OF THE LABOR MANAGEMENT RELATIONS ACT.

Petitioners argue (P. Br. 18) that every act of employees and labor organizations designed to assist labor unions is either protected or proscribed by the Labor Management Relations Act and that Congress has drawn a line separating all such acts into two classes. If protected, they are beyond state control as the exercise of federally-guaranteed rights; if proscribed, they are beyond state control because the Labor Management Relations Act provides an exclusive remedy.

As applied to this case, the argument is that the refusal to cross a picket line is not an unfair labor practice, because of the proviso of Section 8(b); it is therefore a concerted activity protected by Section 7.

The jurisdiction of the National Labor Relations Board, so it is argued, which fails because of the proviso to Section 8(b) is reinstated by Section 7.

In short, the argument is that Section 7 automatically draws around all concerted activities in labor matters a charmed circle which the states have no power to cross.

This argument has no support in the decisions. The Labor Management Relations Act guarantees some rights, provided that certain conditions are met. It proscribes some acts under certain other conditions. There remains an area in which concerted activities remain open to regulation under laws whose sources are other than the Labor Management Relations Act. Especially is this so where concerted activity can work great harm but, if not subject to state regulation, is subject to no regulation at all.

International Union, United Automobile Workers of America v. *Wisconsin Employment Relations Board*, 336 U. S. 245 (1949), holds that concerted activities in labor disputes are not necessarily removed from the scope of state law directed against illegal activities. There the union had adopted the tactics of causing sudden, unexpected, and irregular work stoppages, which were illegal under Wisconsin law. This Court held that Section 7, which protects concerted activities, did not supersede Wisconsin law. The court held, 336 U. S. at 257, that its previous decisions

> "* * * clearly interdict any rule by the Board that every type of concerted activity is beyond the

reach of the states' adjudicatory machinery. The bare language of § 7 cannot be construed to immunize the conduct forbidden by the judgment below and therefore the injunction as construed by the Wisconsin Supreme Court does not conflict with § 7 of the Federal Act."

Further examples of situations where concerted activities were not held to be protected by Section 7 of the Labor Management Relations Act are the following:

In *National Labor Relations Board* v. *Rockaway News Co.*, 345 U. S. 71 (1953), an employee's refusal to cross a picket line to make deliveries was held unprotected, justifying the employer's discharging him. In *Southern Steamship Co.* v. *National Labor Relation Board*, 316 U. S. 31 (1942), the disobedience of crewmen on shipboard in connection with a labor dispute was held cause to discharge them. In *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740 (1942), violence which accompanied picketing was held unprotected by the National Labor Relations Act and subject to state regulation. For a general discussion of the question, see Cox, *The Right to Engage in Concerted Activities*, 26 Ind. L. J. 319 (1951), especially at 334-44.

This construction of Section 7 was recently reaffirmed in *National Labor Relations Board* v. *Local Union No. 1229, International Brotherhood of Electrical Workers*, 346 U. S. 464 (1953), where this court held that a television station had not committed an unfair labor practice by discharging certain of its em-

ployees who had circulated a handbill disparaging their employer's programs. The court said (346 U. S. at 473):

> "Congress while safeguarding, in §7, the right of employees to engage in 'concerted activities for the purpose of collective bargaining or other mutual aid or protection,' did not weaken the underlying contractual bonds and loyalties of employer and employee. The conference report that led to the enactment of the law said:
>
> '[T]he courts have firmly established the rule that under the existing provisions of section 7 of the National Labor Relations Act, employees are not given any right to engage in unlawful or other improper conduct. . . .'" [H. R. Rep. No. 510, 80th Cong., 1st Sess. 38-9 (1947)]

E. THE REFUSAL TO PICK UP OR DELIVER SHIPMENTS IS NOT A STRIKE PROTECTED BY SECTION 13 OF THE LABOR MANAGEMENT RELATIONS ACT.

Section 13 of the Labor Management Relations Act provides:

> "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

The right to strike is protected under this section of the Labor Management Relations Act, and the states may not interfere with it. *Amalgamated Association of Street, Electric Railway & Motor Coach Employees of*

America v. *Wisconsin Employment Relations Board*, 340 U. S. 383 (1951).

On the other hand, work stoppages of a kind other than strikes are not protected. In *International Union, United Automobile Workers of America* v. *Wisconsin Employment Relations Board*, 336 U. S. 245 (1949), this Court held that the type of irregular work stoppage which the union's members had practiced was not protected under Section 13 of the Labor Management Relations Act. The union promoted these irregular work stoppages as "a better weapon than a strike" because they avoided hardship on employees, but "put strong economic pressure on the employer." 336 U. S. at 249-50. The Wisconsin Employment Relations Board enjoined the employees from "concerted effort to interfere with production of the complainant except by leaving the premises in an orderly manner for the purpose of going on strike." 336 U. S. at 250.

Both the activities and the injunctive relief there in question are very similar to those in this case. The state forbade the intermittent stoppages, but preserved the right to stop work entirely. This Court upheld the state. It said (336 U. S. at 264-5):

> "If we were to read §13 as we are urged to do, to make the strike an absolute right and the definition to extend the right to all other variations of the strike, the effect would be to legalize beyond the power of any state or federal authorities to control not only the intermittent stoppages such as we have here but also the slow-down and perhaps the sit-down strike as well. * * *

"We think that this recurrent or intermittent unannounced stoppage of work to win unstated ends was neither forbidden by federal statute nor was it legalized and approved thereby. * * *

"We find no basis for denying to Wisconsin the power, in governing her internal affairs, to regulate a course of conduct neither made a right under federal law nor a violation of it and which has the coercive effect obvious in this device."

In *National Labor Relations Board* v. *Montgomery Ward & Co.*, 157 F. 2d 486 (8th Cir. 1946), certain employees at Ward's Kansas City store refused to process orders from its Chicago store (where a strike was in progress), but continued otherwise to do their work. The Eighth Circuit held (157 F. 2d at 496-7):

"While these employees had the undoubted right to go on a strike and quit their employment, they could not continue to work and remain at their positions, accept the wages paid to them, and at the same time select what part of their allotted tasks they cared to perform of their own volition, or refuse openly or secretly, to the employer's damage, to do other work.

* * * * * * *

"The Board was in error in holding that by refusing to process the Chicago orders these employees engaged in lawful assistance of their union, protected by Section 7 of the Act. They were not on a strike; they did not leave the premises nor the employment. There being an implied obligation on the part of the employees to obey the reasonable instructions of the employer while the employment continued, their refusal to do so

was proper ground for their discharge, and having been properly discharged there was no duty on the part of respondent to reinstate them."

In *C. G. Conn* v. *National Labor Relations Board*, 108 F. 2d 390 (7th Cir. 1939), certain employees remained at work during their regular shift, but refused to work overtime and were discharged. The Board held that this concerted activity "amounted to a strike," but the court held it was not, saying (108 F. 2d at 397:

"We are of the opinion that the facts in the instant situation do not bring the discharged employees within this or any other definition of the word 'strike' of which we are aware. We are unable to accept respondent's argument to the effect that an employee can be on a strike and at work simultaneously. We think he must be on the job subject to the authority and control of the employer, or off the job as a striker, in support of some grievance.

* * * * * * *

"We are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him. That is plainly what was sought to be done in this instance. It is not a situation in which employees ceased work in protest against conditions imposed by the employer, but one in which the employees sought and intended to continue work upon their own notion of the terms which should prevail. * * *"

In *Hoover Company* v. *National Labor Relations Board,* 191 F. 2d 380, 389 (6th Cir. 1951), the Court said:

> "* * * An employee can not work and strike at the same time. He can not continue in his employment and openly or secretly refuse to do his work. He can not collect wages for his employment, and, at the same time, engage in activities to injure or destroy his employer's business. * * *"

These cases were cited with approval in *International Union, United Automobile Workers of America* v. *Wisconsin Employment Relations Board,* 336 U. S. 245, 257 (1949), and *National Labor Relations Board* v. *Local Union No. 1229, International Brotherhood of Electrical Workers,* 346 U. S. 464, 476 n. 12 (1953).

The injunction below scrupulously refrained from interfering with the right of the carriers' employees to go out on an actual strike of the kind which is protected under Section 13 of the Act.

The refusal of the employees of common carriers to enter upon respondent's—and only respondent's—premises was an irregular and selective work stoppage, not a strike which is protected by Section 13 of the Labor Management Relations Act. It was not an unfair labor practice of which the National Labor Relations Board could take jurisdiction under Sections 8(b) and 10(a) of the Act. It was proper for Kentucky to forbid it.

It was therefore also proper for Kentucky to forbid the inducement of employees of common carriers to commit the acts of discrimination which were directly forbidden. The act being illegal, inducement of another to commit the act may properly be restrained. *Building Service Union* v. *Gazzam*, 339 U. S. 532 (1950); *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490 (1949).

POINT II.

The Decision Below Properly Refused to Enforce the Agreement Permitting Employees of Common Carriers to Refuse to Pick Up or Deliver Shipments.

Petitioners argue that the agreement between the carriers and their employees exempting the employees from the duty of picking up or delivering goods at struck premises or handling unfair goods relieves them from the duty of serving respondent without discrimination. This argument has two aspects: (1) That the agreement limits the scope of the employment of carriers' employees, so that it is no part of their duties to pick up and deliver goods at struck premises; and (2) that the agreement is protected under the Labor Management Relations Act and can supersede contrary state law.

1. As to the argument (P. Br. 36-7) that the agreement defines the duties of employees of common carriers to exclude picking up and delivering goods at struck premises, it is clear that agreements cannot limit the scope of employment in a way calculated to thwart public policy or the law of the land. This Court, in *Steele* v. *Louisville & Nashville Railroad*, 323 U. S. 192 (1944); *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210 (1944; and *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen*, 338 U. S. 232 (1949), saw through attempts to use job classifications and assignments established by collective bargaining agreements as means to practice racial discrimination; it enjoined the enforcement of

the agreements. See, also, *Montgomery Ward & Co.* v. *Terminal Co.*, 32 L. R. R. M. 2386, 23 CCH Lab. Cas. Par. 67,713 (D. Ore., 1953).

2. Petitioners and the National Labor Relations Board cite *National Labor Relations Board* v. *Rockaway News Supply Co.*, 345 U. S. 71 (1953), for the proposition that an agreement excusing the employees of a common carrier from their duty of service because of a strike is protected by federal law. They rely only upon an isolated sentence in the opinion, 345 U. S. at 80, and do not take any account of the facts of the case. In that case, the Rockaway News Supply Co. was in the business of picking up newspapers from their publishers and delivering them to retailers. It was not a common carrier. A newspaper became involved in a labor dispute with its own employees, who picketed its plant. Waugh, an employee of Rockaway News Supply Co., seeing the picket line, refused to cross it to pick up newspapers and was discharged.

The collective bargaining agreement of Waugh's union with his employer contained a provision that the employees would not engage in strikes or "other cessation of work."

This Court held that the no-strike provision was not prohibited by the Labor Management Relations Act, and that Waugh was properly discharged for violating it. The Court then made the remark that the proviso to Section 8(b) of the Labor Management Relations Act "clearly enables contracting parties to embody in their contract a provision against requiring an employee to cross a picket line if they so agree."

Conceding that a non-carrier employer, with no legal duty to serve any particular customer, may contract with his employees that their duties shall not include crossing a picket line, Respondent submits that the *Rockaway News Supply Co.* case cannot be extended to cover an employer who would thereby disable himself from performing a service which he has a legal duty to the customer—and to the public—to perform, nor to protect employees who seek thereby to obtain for themselves the privilege of violating at will the law which defines their duties.

In the language of Mr. Justice Holmes in *Hudson County Water Co.* v. *McCarter,* 209 U. S. 349, 357 (1908):

> "* * * One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject-matter."

See, also, his language in *Dillingham* v. *McLaughlin,* 264 U. S. 370, 374 (1924):

> "* * * The operation of reasonable laws for the protection of the public cannot be headed off by making contracts reaching into the future."

This Court has recognized the power of the states to enforce their laws and public policy unhampered by contracts which purported to remove the subject matter from the states' regulatory power.

Bowersock v. *Smith,* 243 U. S. 29 (1917), dealt with a claim for wrongful death of an employee resulting

from the employer's failure to comply with the law requiring guards around dangerous machinery. The employer contended that he had made an agreement with the deceased employee, who thereby had undertaken to furnish the necessary guards, and this agreement relieved him of liability. The Court rejected this contention, 243 U. S. at 34-5:

> "It is clear that the statute * * * imposed a duty as to safeguards upon the owner which was absolute and as to which he could not relieve himself by contract. * * * in the nature of things the want of power to avoid the duty and liability which the statute imposed embraced all forms of contract, whether of employment or otherwise, by which the positive commands of the statute would be frustrated or rendered ineffacious."

Furthermore, since the agreement in question was not made with respondent, but with persons entirely unrelated to respondent, there is even more reason for holding it ineffective in the circumstances of this case. This Court said, in *Missouri Pacific Ry.* v. *Larabee Flour Mills Co.*, 211 U. S. 612, 619 (1909): "Whenever one engages in that business [common carrier] the obligation of equal service to all arises * * *." Since this is so, why should this obligation of equal service to all the public be subject to variation, not at the overriding behest of the Legislature, but at the desire of carriers and third persons with whom they contract? If the rights of the public are not to be cut down by contracts which carriers make with members of the public themselves, *e. g., Railroad Co.* v. *Lockwood*, 17

Wall. 357 (U. S. 1873), there is even less reason for them to be cut down by contracts which carriers make with third persons.

While Respondent need not argue any point not directly at issue before this Court, it suggests that a possible rationale of and accommodation between the proviso to Section 8(b) of the Labor Management Relations Act and the contract provision between employers and their employees would be: The proviso to Section 8(b) prevents the refusal to cross a picket line from being considered an unfair labor practice under the Labor Management Relations Act. The proviso does not affect the validity or invalidity of such a refusal under state law. Where the law governing carriers treats such a refusal by the employees of a common carrier as a discriminatory practice, the carriers and their employees may not by contract permit this discrimination.* In other situations, employers and their employees are free to provide by contract that the employees need not cross—or that they must cross—a picket line set up by the employees of someone with whom the employer does business.

This suggested construction allows room for federal law, state law, and the contracts of employers and employees; it accommodates the various interests by minimizing the conflicts among them.

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*Torbert, "Section 8 (b) (4) (A) of the Taft-Hartley Law: A Study in Statutory Interpretation," 8 Rutgers L. Rev. 344, 372 (1954), concludes from a study of the cases that contracts of the type involved here are not unlawful if "Common carriers and shippers are not involved."

POINT III.

The Federal Question of the Jurisdiction of the Interstate Commerce Commission Was Not Timely Raised in the Courts of Kentucky and Is Not Properly Before This Court.

Although the fact that transportation in interstate commerce was involved was obvious from the beginning of the suit, the question of the jurisdiction of the Interstate Commerce Commission was not raised by the pleadings, or argued in the trial court, nor in any way mentioned in the record which went up to the Court of Appeals of Kentucky, nor was it presented in petitioners' brief.

Under the settled law of Kentucky, the Court of Appeals does not determine questions not raised in the trial court.

> "It is an unvarying rule that a question not raised or adjudicated in the court below cannot be considered when raised for the first time in this Court." *Combs, Judge* v. *Knott County Fiscal Court,* 283 Ky. 456, 458, 141 S. W. 2d 859, 860 (1940).

To the same effect are *Tipton* v. *Brown,* 273 Ky. 496, 117 S. W. 2d 217 (1938); *Dorman* v. *Hook,* 260 Ky. 367, 85 S. W. 2d 1001 (1935); and, in more detail with citation of substantial authority, *Benefit Ass'n of Ry. Employees* v. *Secrest,* 239 Ky. 400, 411, 39 S. W. 2d 682, 686-7 (1931); *Cf. Bailey* v. *Anderson,* 326 U. S. 203, 206-7 (1945); *Mutual Life Ins. Co. v. McGrew,* 188 U. S. 291, 309 (1903).

After the Court of Appeals of Kentucky had affirmed the judgment below, the federal question of the jurisdiction of the Interstate Commerce Commission was for the first time raised in a petition for rehearing to the Court of Appeals of Kentucky.

"It is an established rule that briefs filed in the state courts form no part of the state court record for the purpose of Supreme Court review; and ordinarily they cannot be relied upon to establish that a federal question was raised, even if they are incorporated into the record sent to the Supreme Court." Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States §79 (Wolfson and Kurland eds. 1951). As this Court said in *Susquehanna Boom Co.* v. *West Branch Boom Co.*, 110 U. S. 57, 59 (1884):

> "We act on the case as made to the court below when the judgment was rendered, and cannot incorporate into the record any new matter which appears for the first time after the judgment, on a petition for rehearing. Such a petition is no part of the record on which the judgment rests."

The original opinion of the Court of Appeals of Kentucky did not refer in any way to the question of interstate commerce. That Court's treatment of the petition for rehearing appears in its order of February 5, 1954 (95):

> "The Court being sufficiently advised, the petition of appellants for a rehearing be and the same is hereby overruled, and opinion modified on its face."

None of the modifications of the Court's original opinion referred to in this order have anything to do with the question of the jurisdiction of the Interstate Commerce Commission.* There is nothing in the record or in the opinion in its final form to indicate that the question whether the Interstate Commerce Commission had jurisdiction was considered or determined on its merits.

The situation is thus no different from that in *Rooker* v. *Fidelity Trust Co.*, 261 U. S. 114, 117 (1923):

> "All that appears is that after the judgment of affirmance the plaintiffs sought to raise the question by a petition for rehearing, which was denied without opinion. But that effort came too late. *Bushnell* v. *Crooke Mining & Smelting Co.*, 148 U. S. 682, 689; *Godchaux Co.* v. *Estopinal*, 251 U. S. 179; *Citizens National Bank* v. *Durr*, 257 U. S. 99, 106 * * *. It is at least doubtful that the question is one of any substance, but its tardy presentation renders further notice of it unnecessary."

A similar holding appears in *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444, 455 (1924):

> "This Court has always held it a prerequisite to the consideration here of a federal question in a case coming from a state court that the question should have been raised in that court before decision, or that it should have been actually enter-

*The two opinions of the Kentucky Court of Appeals are printed in consolidated form, so as to show exactly what modifications were made, in the Appendix, pages 61-70. Since no change in the substance of the Opinion was made, this case may fairly be classified as one in which the petition for rehearing was denied "without opinion."

> tained and considered upon petition to rehear. A mere denial of the petition by the state court without opinion, is not enough."

See also *Radio Station WOW, Inc.* v. *Johnson,* 326 U. S. 120, 128 (1945); *American Surety Co.* v. *Baldwin,* 287 U. S. 156, 163 (1932); *Live Oak Water Users' Association* v. *Railroad Commission of California,* 269 U. S. 354, 357 (1926); *Fullerton* v. *Texas,* 196 U. S. 192 (1905); *Simmerman* v. *Nebraska,* 116 U. S. 54 (1885); Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States §75 (Wolfson and Kurland eds. 1951); Stern and Gressman, Supreme Court Practice 88-9 (2d ed. 1954).

It being apparent that the federal question was not properly before the Court of Appeals of Kentucky and that that Court did not pass upon it, petitioners have attempted to import the federal question into this case by means of two certificates of a justice of that Court. The first certificate (103-4) was signed by Mr. Justice Brady M. Stewart as "Acting Chief Justice of Court of Appeals of Kentucky." This certificate is insufficient under the rule of *Charleston Federal Savings & Loan Association* v. *Alderson,* 324 U. S. 182, 186 n. 1 (1945). In that case this Court refused to accept a memorandum opinion of the presiding justice of a State court of last resort to the effect that a federal question was raised and decided. Chief Justice Stone wrote:

> "While a certificate of the state court, made part of the record, to the effect that the federal question in issue was decided there is generally

> sufficient to sustain our jurisdiction, when it is consistent with the record * * *, a certificate to the same effect by the presiding justice of the state appellate court does not suffice, although it may serve to interpret indefinite or ambiguous evidence in the record, relied upon to show that the federal question was raised."

See Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States §81 (Wolfson and Kurland eds. 1951); Stern and Gressman, Supreme Court Practice 93-4 (2d ed. 1954); Wolfson and Kurland, *Certificates By State Courts of the Existence of a Federal Question,* 63 Harv. L. Rev. 111 (1949).

After September 20, 1954, when Mr. Justice Stewart became Chief Justice of the Court of Appeals of Kentucky, see 269 S. W. 2d v, and apparently after this Court granted the petition for certiorari, petitioners obtained a second certificate (105) from Mr. Justice Stewart as "Chief Justice, Court of Appeals of Kentucky." This certificate has all the infirmities of the first certificate. Neither certificate purports to "interpret indefinite or ambiguous evidence in the record"; each seeks to remedy a complete lack of evidence.

The case before the Court is thus even weaker than *Consolidated Turnpike Co.* v. *Norfolk & Ocean View Railway,* 228 U. S. 326 (1913), where this Court rejected a certificate by the presiding justice of a state court of last resort which was more specific than the certificates of Mr. Justice Stewart in that it specifically set out the federal question. The Court said (228 U. S. at 334:

"Having neglected to raise any Federal question before the final judgment in the state Supreme Court, and having failed to obtain a rehearing that the question might thereby be raised and a decision obtained upon it, the plaintiffs in error have endeavored to show that in fact the Supreme Court of Virginia did rehear the case upon their petition and did decide the Federal question, therein for the first time raised, adversely, by obtaining the certificate of the Chief Justice of the court, *months after the court had handed down its final opinion,* that the court, 'refused the said petition for a rehearing on the ground *inter alia* that the decree or decision of this court . . . did not constitute a taking of the property of the defendants in error without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and that the said defendants in error were not thereby deprived of any rights under said Amendment.' This certificate was never made the order of the court and a part of the record, as in *Marvin* v. *Trout,* 199 U. S. 212, where it was held 'perhaps sufficient' to show what Federal question was decided in a case where no opinion was filed. But that such a certificate can do no more than make more definite and certain that which otherwise may be insufficiently shown by the record proper is the settled rule of this court. That in itself it cannot confer jurisdiction is too plain for controversy." (Emphasis added.)

Petitioners' only reply to the argument that the federal question of the jurisdiction of the Interstate Commerce Commission is not properly before this Court is a citation, in a footnote of their brief (p. 75 n. 24), to *Baltimore & Ohio Railroad* v. *United States*

ex rel. Pitcairn Coal Co., 215 U. S. 481 (1910). This Court was there reviewing the decision of a lower federal court, not a state court, so there was no necessity for seasonably raising a federal question at an appropriate time. The proper respect owed by litigants to state courts requires that those who would upset their decisions on federal grounds should carefully preserve and present the federal question. *Cf.* Revised Rules of the Supreme Court of the United States, Rule 23 (1)(f).

The federal question was raised too late below. It is too late to raise it here.

POINT IV.

The Injunction Does Not Infringe Upon the Jurisdiction of the Interstate Commerce Commission.

The Interstate Commerce Act is not intended to occupy the entire field of transportation law so as to deprive state courts of all jurisdiction of cases arising under the Act; on the contrary, it expressly preserves existing statutory and common-law rights and remedies.

Section 9, 49 U. S. C. §9,* provides that any person claiming to be damaged by any carrier may complain to the Commission *or* may bring suit in his own behalf, but must elect which remedy he will pursue.

Section 22, 49 U. S. C. §22, provides in part:

> "* * * nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies * * *"

Section 216(j) of the same Act, 49 U. S. C. §316(j), provides:

> "Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith."

Although the literal language of Sections 9 and 22 of the Interstate Commerce Act might have been thought to make resort to the Interstate Commerce Commission optional, this Court, in *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1904), held that

*Appendix, p. 71.

certain cases of discrimination must first be taken to the Interstate Commerce Commission and that courts might not at the outset hear them.

The *Abilene* case, however important as it is, has never been regarded as cutting off all resort to courts. Just a few years after it decided the *Abilene* case, this Court, in *Missouri Pacific Ry.* v. *Larabee Flour Mills Co.*, 211 U. S. 612 (1909), upholding a judgment of the Supreme Court of Kansas which required the Railroad to serve the Mills without discrimination, disposed of the contention that jurisdiction of the Interstate Commerce Commission was exclusive, saying, at 619-620, 623:

> "The Missouri Pacific engaged in the business of transferring cars from the Santa Fe track to industries located at Stafford, and continued to do so for all parties except the mill company. So long as it engaged in such transfer it was bound to treat all industries at Stafford alike, and could not refuse to do for one that which it was doing for others. No legislative enactment, no special mandate from any commission, or other administrative board was necessary, for the duty arose from the fact that it was a common carrier. This lies at the foundation of the law of common carriers. Whenever one engages in that business the obligation of equal service to all arises, and that obligation, irrespective of legislative action or special mandate, can be enforced by the courts.
>
> * * * * * * *
>
> "On the other hand, it is said that Congress has already acted, has created the Interstate Commerce Commission, and given to it a large measure of control over interstate commerce. * * * Run-

ning through the entire argument of counsel for the Missouri Pacific is the thought that the control of Congress over interstate commerce and a delegation of that control to a commission necessarily withdraws from the State all power in respect to regulations of a local character. This proposition cannot be sustained. Until specific action by Congress or the commission the control of the State over these incidental matters remains undisturbed."

The wrong which the injunction here sought to prevent was the arbitrary and unlawful refusal by drivers employed by common carriers to handle shipments to or from respondent's plant. This refusal was motivated solely by their desire to assist other members of the same union in their dispute with respondent's subsidiary. It was not based upon any difficulty or danger that would be encountered; there was none. It was not based upon any rule or practice of the employing carriers, for the carriers did everything in their power to persuade their employees to handle the goods, and never questioned their obligation, as carriers, to see that the shipments were moved. The carriers were not parties to the case, and the injunction is not directed at them. They were not doing anything which the Interstate Commerce Commission could forbid, nor refusing to do anything which the Commission could command. There was no administrative question between the carriers and respondent which called for exercise of the specially qualified jurisdiction of the Commission. As between the carriers and respondent there was no question at all.

That the state courts are authorized to grant relief in such situations was made clear in this Court's decision of *Pennsylvania Railroad* v. *Puritan Coal Mining Co.*, 237 U. S. 121 (1915), a suit brought in a state court by a shipper to recover damages for the Railroad's discrimination in not furnishing as many cars as its own rules called for. In upholding the state court's judgment, this Court referred to the Interstate Commerce Act as follows, 237 U. S. at 130:

> "It gave shippers new rights, while at the same time preserving existing causes of action. It did not supersede the jurisdiction of state courts in any case, new or old, where the decision did not involve the determination of matters calling for the exercise of the administrative power and discretion of the Commission; or relate to a subject as to which the jurisdiction of the Federal courts had otherwise been made exclusive."

Noting that the case had been treated as an offense against the common-law duty, the state statute, and the federal statute, this Court held that the shipper was entitled to recover for breach of the common-law duty, 237 U. S. at 133, and that the question of fact involved was properly determinable by the state court, 237 U. S. at 131-2:

> 'But if the carrier's rule, fair on its face, has been unequally applied and the suit is for damages, occasioned by its violation or discriminatory enforcement, there is no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage. Such suits,

though against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the state or Federal courts."

The only question in this case is a question of law uncomplicated by any matters of administrative discretion. The courts are the proper bodies to decide questions of law, and recourse need not be had to the Interstate Commerce Commission.

In *Louisville & Nashville R.* v. *F. W. Cook Brewing Co.*, 223 U. S. 70 (1912), a common carrier had refused to deliver beer in interstate commerce because a Kentucky law prohibited common carriers from transporting alcoholic beverages. This Court held that a shipper of beer need not resort to the Interstate Commerce Commission, but might properly seek an injunction requiring the railroad to carry its products. This Court held that the propriety of the Railroad's refusal to carry turned upon the validity of a state statute. It said (223 U. S. at 84):

> "There was no discrimination if the law was valid, and the result must turn, not upon any administrative question or questions of fact within the scope of the power of the Commission, but upon the validity of the legislation which controlled the action of the carrier. That is a question of general law for a judicial tribunal, and one not competent for the Commission as a purely administrative body.
>
> "The decision in the case of *Texas & Pacific Railway* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, is not applicable here. The question there was one of the reasonableness of a rate. Such a question is primarily one of administrative character, and

> the propriety of a prior resort to the Commission to obtain a ruling upon the question of reasonableness involved the very heart of the whole statute."

In *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U. S. 285 (1922), the rights of the parties depended entirely upon a legal construction of a tariff. The construction did not turn upon matters of fact and there was no question of administrative discretion. This Court held that a state court, not the Interstate Commerce Commission, had jurisdiction to construe the tariff.

In *Pennsylvania R.* v. *Sonman Shaft Coal Co.*, 242 U. S. 120 (1916), a shipper asserted in a state court that the carrier was not allotting it the number of coal cars sufficient for its needs. The carrier contended that it was applying a rule governing car allotments and that, if this rule were to be attacked, it should be attacked only before the Interstate Commerce Commission, which had primary jurisdiction to pass on an administrative question of this nature. This Court said (242 U. S. at 126):

> "We cannot accede to the contention. The conditions in the coal trade being normal, as just shown, the number of cars to which the coal company was entitled was to be measured by its reasonable requests based upon its actual needs. It is only in times of car shortage resulting from unusual demands or other abnormal conditions, not reasonably to have been foreseen, that car distribution rules originating with the carrier can be regarded as qualifying or affecting the right of a shipper to demand and receive cars commensurate in number with his needs."

A car allotment rule in time of shortage might have to be passed upon by the Interstate Commerce Commission, but that was not the case when there was no shortage.

Similarly, the strike at respondent's premises did not disturb the availability of the trucks of common carriers. They would have been able to fill respondent's usual needs for trucks. There is no showing that increased service was unavailable or that it was even demanded.

In *Pennsylvania R.* v. *International Coal Mining Co.*, 230 U. S. 184 (1913), the question was as to the validity of a rebate. It was contended that this question was one for the rate-regulating discretion of the Interstate Commerce Commission. This Court held that rebates were forbidden by positive law and said (230 U. S. at 197):

> "It could not have been legalized by any proof, nor could the Commission by any order have made it valid. The rebate being unlawful, it was a matter where the court, without administrative ruling or reparation order, could apply the fixed law to the established fact that the carrier had charged all shippers the published or tariff rate and refunded a part to a particular class."

See, also, *Pacific Gamble Robinson Co.* v. *Minneapolis & St. L. Ry.*, 83 F. Supp. 860 (D. Minn. 1949), appeal dismissed, 181 F. 2d 812 (8th Cir. 1950).

Petitioners have argued on various grounds that the Interstate Commerce Commission has jurisdiction and that respondent should have resorted to it.

Petitioners first argued that the common carriers did not hold themselves out to serve strike-bound customers whose premises were being picketed. Petitioners' primary authority for this contention is *Pick Up Delivery Restrictions in Official Territory,* 269 I. C. C. 191 (1947).

Petitioners place too heavy a burden upon this decision. There the Commission approved the following tariff provision:

> "Impracticable Operation
>
> "Nothing in this tariff shall require the carrier to perform pick up or delivery service at any location from or to which it is impracticable, through no fault or neglect of the carrier, to operate vehicles because of:
>
> (a) The condition of roads, streets, driveways or alleys.
>
> (b) Inadequate loading or unloading facilities.
>
> (c) Any riot, strike, picketing or other labor disturbance."

This provision read as a whole does not sanction the blanket refusal of a carrier to serve a customer because of a strike. The rule is in terms of what is practicable. The duty of a common carrier has never been absolute, nor does the decision below make it absolute. When a customer complains that a common carrier has not performed its duties, the facts may exonerate the carrier on various grounds, for instance, that the roads were impassable or that a strike at a customer's premises was attended with such violence

as to render it impracticable for the carrier to make deliveries. But all these defense are questions of fact, and the mere existence of a strike will not by itself free a carrier from performing its duty. *Minneapolis & St. Louis Ry.* v. *Pacific Gamble Robinson Co.,* 215 F. 2d 126 (8th Cir. 1954).

Petitioners' next argument is based on a failure to comprehend the rationale of the cases which they cite for the proposition that primary jurisdiction is in the Interstate Commerce Commission (P. Br. 73-8). All the cases which they cite are plainly of a technical nature whose determination requires the competence in transportation matters which the Interstate Commerce Commission possesses. Even a reading of petitioners' abstract of these cases in their brief is persuasive that they were outside the range of competence of the courts and within the special province of the Interstate Commerce Commission. For instance, such questions as whether open-top coal cars rather than box cars should be delivered to wagon mines as well as to tipple mines, as in *Midland Valley R.* v. *Barkley,* 276 U. S. 482 (1928), or the allocation of cars during a car shortage, as in *Baltimore & Ohio R.* v. *United States ex rel. Pitcairn Coal Co.,* 215 U. S. 481 (1910), or whether a carrier should have carried by one route rather than another, as in *Northern Pacific R.* v. *Solum,* 247 U. S. 477 (1918), are indubitably matters for the Interstate Commerce Commission.

One of the cases which petitioners cite (P. Br. 76-7) points this up well. In *Mitchell Coal & Coke Co.* v. *Pennsylvania R.,* 230 U. S. 247 (1913), this Court

required that the Interstate Commerce Commission determine the legality of certain practices in the first instance because they involved a question of reasonableness. Another aspect of the case, however, was held to be properly before the court under the rule of *Pennsylvania R.* v. *International Coal Mining Co.*, 230 U. S. 184 (1913), since it involved the legality *vel non* of a rebate, a question of law which a court could properly determine.

Contrary to petitioners' assertion (P. Br. 67), uniformity in interpreting the Interstate Commerce Act does not have to be secured by giving primary jurisdiction to the Interstate Commerce Commission. A similar argument, which was made in *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U. S. 285 (1922), did not move this Court. Justice Brandeis wrote (259 U. S. at 290-1):

> "If the parties properly preserve their rights, a construction given by any court, whether it be federal or state, may ultimately be reviewed by this court either on writ of error or on writ of certiorari; and thereby uniformity in construction may be secured. Hence, the attainment of uniformity does not require that in every case where the construction of a tariff is in dispute, there shall be a preliminary resort to the Commission."

Petitioners also cite *New York Lumber Trade Association* v. *Lacey*, 245 App. Div. 262, 281 N. Y. Supp. 647 (2d Dep't), aff'd without opinion, 269 N. Y. 595, 199 N. E. 688 (1935), cert. denied, 298 U. S. 684 (1936). Far from being "A leading—perhaps the leading—

case in the state courts respecting the question of state versus federal jurisdiction in the field of interstate shipping," as petitioners assert (P. Br. 80), this case has been cited only three times, never outside New York, and only on other grounds. The Appellate Division of the Supreme Court of New York did not rest its decision on the primary jurisdiction of the Interstate Commerce Commission. Since commerce by water was involved, an entirely different act, the Shipping Act of 1916, applied, as well as decisions such as *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U. S. 474 (1932), which interpreted it. The Appellate Division also recognized that the case came under the admiralty jurisdiction of the United States and could not be decided in state courts.

Petitioners also attempt to distinguish *Missouri Pacific Ry.* v. *Larabee Flour Mills Co.*, 211 U. S. 612 (1909), and *Pennsylvania R.* v. *Puritan Coal Mining Co.*, 237 U. S. 121 (1915). The grounds of distinction are insubstantial. For instance, petitioners treat the *Larabee Flour Mills* case as involving "an isolated act of discrimination against one particular shipper, not a practice regularly engaged in as is the case in the instant litigation * * *" (P. Br. 83). Petitioners also assert that a finding of discrimination in that case "would not operate to disrupt an existing rule or practice regularly engaged in by the carrier * * *" (*ibid.*).

These grounds of distinction do not bear examination. The statement of the Larabee case, 211 U. S. at 615, shows that the Railroad undertook a complete

cessation of service to Larabee following a dispute as to a demurrage charge, just as the drivers here undertook to completely deprive respondent of transportation by truck because of their Union's dispute with respondent's subsidiary. Neither does the record here show any regular practice of discrimination against picketed customers generally. The record suggests that it was sporadic if anything. At any rate, the regularity or irregularity of the practice is no criterion.

Petitioners attempt to distinguish the *Puritan Coal Mining Co.* case on the ground that there the carrier had failed to comply with its own rule and that "no administrative expertise was required in the resolution of the issue" (P. Br. 84). This is only a part of the story. As shown above, the courts also have jurisdiction when the legality of a practice of carriers is challenged and the question of legality can be determined under rules of law alone.

Finally, petitioners argue "that the Interstate Commerce Commission has on various occasions taken jurisdiction to adjudicate the precise issue in this case, *i. e.*, the legality of a carrier's practice in respect to making pick ups and deliveries at strike-bound plants * * *" (P. Br. 85).

The decisions of the Interstate Commerce Commission which petitioners cite are not authoritative. In none of the cases were the employees of the carriers or their labor union parties, and the Interstate Commerce Commission could not have asserted jurisdiction over the employees or their bargaining agents. The

sole duty and authority of the Interstate Commerce Commission over the employees of common carriers is as to their "qualifications and maximum hours of service * * * and safety of operation and equipment." Interstate Commerce Act §204(a)(1), 49 U. S. C. §304(a)(1).

The refusal of the carriers' employees to handle respondent's shipments was not a matter which affected the safety of the operations of the carriers. Consequently, the Act vests no authority in the Commission under which it could have required the individual employees to perform their duties.

On the contrary, Section 222(b) of the Act, 49 U. S. C. §322(b), only authorizes the Commission to apply to the United States District Court for the enforcement of the provisions of the Act or of its rules and orders. And, while the District Court is generally authorized by this section to enforce obedience thereto by writ of injunction or by other process, it is prohibited by the Norris-Laguardia Act, 29 U. S. C. §104 (a), from requiring the delinquent drivers to perform their duties. *Lee Way Motor Freight, Inc.*, v. *Keystone Freight Lines, Inc.*, 126 F. 2d 931 (10th Cir.), cert. denied, 317 U. S. 645 (1942); *Southeastern Motor Lines, Inc.*, v. *Hoover Truck Co., Inc.*, 34 F. Supp. 390 (M. D. Tenn. (1940).

Because the Commission does not have jurisdiction over the employees of common carriers, the relief it has been able to give has been only indirect. Thus, in *Planters Nut & Chocolate Co.* v. *American Transfer Co.*, 31 M. C. C. 719 (1942), the Interstate Commerce

Commission found certain carriers guilty of discrimination in refusing, because they were afraid their own employees would go out on strike, to make interchanges with other carriers who were involved in a labor dispute. The Commission said (31 M. C. C. at 729):

> "The defendants cannot escape their common-carrier obligations by asserting that the violations complained of are caused by their employees. The corporations are responsible under the law for the acts of employes performed in connection with common-carrier duties; such acts are not beyond the scope of the employment. * * *
>
> "The defendants are not required by part II of the act to establish through routes and joint rates. They have elected to do so. * * * Common carriers by motor vehicle are obligated to accept and transport all freight offered to them in accordance with the provisions of their tariffs. The refusal of the group-two carriers to accept and transport complainants' freight tendered to them by Rutherford and the group-one carriers was and is unlawful. If the group-two carriers desire to continue to serve the public as common carriers, they should serve all of the public, including complainants."

Although this decision runs counter to many of petitioners' contentions and is a more appropriate authority for respondents to cite, yet it is basically unsatisfactory because it leaves the employees of the discriminating carriers free to refuse to perform their duties, and to threaten to strike unless their employers discriminate. If the employees refuse to obey their employers' orders to interchange freight, perhaps

their employers could discipline them (*Matter of Missouri Pacific Railroad,* 15 CCH Labor Cases ¶64,849, 23 L. R. R. M. 2135 (E. D. Mo. 1948)), but this is at best circuitous.

Accordingly, it would have been impossible for Respondent to obtain, through proceedings before the Interstate Commerce Commission, the relief which it obtained in the courts below.

The Kentucky courts were competent to grant the relief against the employees of common carriers which Respondent sought, and Respondent properly obtained this relief there.

CONCLUSION.

The judgment of the Court of Appeals of Kentucky should be affirmed.

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APPENDIX.

COURT OF APPEALS OF KENTUCKY

June 2, 1953

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, ET AL., - - *Appellants,*

v.

THE AMERICAN TOBACCO COMPANY, INC., - *Appellees.*

Appeal from Jefferson Circuit Court,
Chancery Branch, Second Division,
Honorable Stuart Lampe, Judge.

OPINION OF THE COURT BY JUDGE STEWART, AFFIRMING ON THE APPEAL AND ON THE CROSS-APPEAL.

Two questions are presented for determination on this appeal and cross-appeal:

1. Are the pickets around the property of the American Tobacco Company, herein referred to as "American," at 17th and Broadway Streets in Louisville, involved in primary or secondary picketing, since the strike is conducted at the same address against American Suppliers, Incorporated, herein called "Suppliers"?

2. May a driver of a common or contract carrier be compelled against his wishes by injunctive process to cross

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NOTE:

The two opinions are printed in consolidated form, to show the changes made on denial of rehearing.

Language appearing in the first opinion but omitted in the second opinion is in boldface type.

Language substituted or added in the second opinion is in italics.

a picket line advertising a lawful strike, when the driver is a member of the same union that is conducting the strike, but he is not on strike himself?

We have chosen to consider the cross-appeal, or question No. 1, first.

On March 30, 1952, Local Union No. 89 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America of the American Federation of Labor, hereinafter referred to as "Local 89" for the sake of brevity, called a strike against Suppliers and threw picket lines around four of its establishments *in Louisville*, viz.: A redrying plant at 9th and Magnolia Streets; an office with a small warehouse attached at 908 South 8th Street; a group of warehouses at 7th Street and Arcade Avenue; and a "stemmery" situated upon American's property at 17th and Broadway Streets. Suppliers is a subsidiary of American, but it is not a party to this appeal.

It is the picketing on all sides at the last mentioned location that is the bone of contention. The stemmery is situated on ground owned by American and is completely surrounded by American's cigarette factory, its auxiliary structures and its fences. American maintains that its main gates are on Broadway and that they are not and have never been used for ingress and egress of either personnel or materials of Suppliers except to some small extent. On the other hand it states that access can be had to Suppliers for all purposes from 17th Street. It is therefore perfectly practical, American argues, to set aside the entire side on Broadway for its exclusive use and thereby prevent it from becoming entangled in the labor dispute that exists only between Local 89 and Suppliers. Furthermore, American asserts it is engulfed in this controversy solely because of its corporate and geographical relations with Suppliers, but that there is not now and there has never been any affiliation between its employees and Local 89, so that it is being subjected to a secondary boycott by the conduct of the union, and that the sphere of picket-

ing can and should be restricted to the disputants in such a manner as to relieve it from *the* damaging results that flow therefrom. Local 89 takes the position that the picketing is primary, proper and legal. The Chancellor adopted the view of Local 89, and American has cross-appealed from the judgment in this respect. Accordingly, we must search the record to resolve whether this finding has a reasonable basis in the evidence.

We have mentioned the physical layout of the stemmery. Aside from this, American and Suppliers have an economic interdependence; or, it might be said that Suppliers is the child of American, its parent, because the latter owns all the capital stock in the former. Suppliers buys raw tobacco and puts it through a certain process at the stemmery. The tobacco is then transported from the stemmery to American's cigarette factory by means of a conveyor belt which runs from one to the other. Suppliers sells all its tobacco to American. It was brought out that American owns not only the land by the improvements employed by Suppliers in the operation of the stemmery. There was testimony that Suppliers leased the ground and the plant and paid rent to American for the use of the same; however, the terms of the lease and the amount of the rent were unknown to the local officials of either corporation. A central power plant on the property supplies steam to the facilities of both corporations, Suppliers paying for this service. The trucks of Suppliers *display* **(carry)** advertisements of "Lucky Strike," a well-known manufactured product of American. Over the entrance of another plant of Suppliers at 7th *Street* and Arcade *Avenue* **(Streets)**, which is not immediately connected with this litigation, the name on the sign reads: "American Tobacco Company." At times employees of Suppliers work for American and the latter pays the former for such services. Employees of Suppliers also receive four packages of American made cigarettes as a part of their weekly compensation. If an employee of Suppliers is badly injured or becomes seriously ill, that person is sent to American's hospital for

treatment. To sum up, Suppliers and American operate as a unit, except that each is a corporate entity and each is under separate management locally.

In the light of the foregoing factual background, we are confronted with this question: Is American a neutral in the existent dispute between Suppliers and Local 89? The test to be applied in arriving at a proper conclusion on this point may be thus stated: "An important factor in determining whether the activities of a union against an employer other than the one with which the union has a labor dispute come within the purview of the secondary boycott provision is the relationship between the two employers. If the relationship is so close that one may be regarded as the 'ally' of the other, picketing of one may be permissible during a labor dispute with the other." See 16 A. L. R., 2d, paragraph 6, page 6. However, we are not without precedent on this subject in this jurisdiction.

In the recent case of Local 181, etc. v. Broadway and Fourth Avenue Realty Company, Ky., 248 S. W. 2d 713, a strike involved a corporation which owned and operated the Brown Hotel and the Kentucky Hotel and another corporation which owned and operated the Martin Brown Building, all located in Louisville. Both corporations were, except for qualifying shares, entirely owned by Mr. Graham Brown. In *that case* **(this opinion)** in passing on a contempt proceeding, we not only treated the whole controversy as a single labor dispute but we considered Mr. Graham Brown and the two corporations as in reality one and the same. There we said:

> "Supporting the conclusion that this is in the broad sense one labor dispute, is the fact that when the strike first commenced, picketing was begun at the Martin Brown Building, as well as the two hotels, although at that time there was no claim of a labor dispute affecting the employes of the Martin Brown Building.
>
> "In the eyes of the public, this has been a strike against Mr. Graham Brown, and the acts of violence

have been committed by persons having a labor dispute with Mr. Brown."

We think the industrial alliance between Suppliers and American is so close that both may be considered as one operation. From the standpoint of physical setup the two are so enmeshed that they cannot be split apart without doing violence to both. To suggest that American has no interest in the dispute between Suppliers and Local 89 is to look at the form and remain blind to the substance. Nor can the naked claim of corporate separability be raised as a bar to picketing the primary employer at 17th and Broadway Streets. To remove the pickets from any side of this property would be to remove them from Suppliers at that location. It cannot, therefore, be said that American is a neutral under the circumstances and that the picketing amounts to a secondary boycott at the above address. We conclude that the Chancellor correctly disposed of this issue.

Local 89 seeks by its appeal to nullify so much of the injunction as requires a driver of a common or contract carrier to cross against his will a picket line where a strike is in progress. It so happens in this instance that the carrier employees are members of the same union as those conducting the strike against Suppliers. It should be emphasized, however, that they refuse to handle freight for American while remaining in the service of their employer.

The rule of law that common carriers and their employees must serve all members of the public without discrimination is firmly established in Kentucky and, so far as we can find, in all the states. Its origin goes far back into the common law. Section 196 of the Constitution of Kentucky embodies the principle in this language: "Transportation of freight and passengers by railroad, steamboat or other common carrier, shall be so regulated, by general law, as to prevent unjust discrimination. No common carrier shall be permitted to contract for relief from its common law liability." Subsections 1 and 2 of KRS 281.685

read in part that no common or contract carrier shall "subject any person to any unreasonable discrimination." KRS 281.990(1) stipulates that any person who "violates, or causes, aids or abets any violation of, any of the provisions of this chapter," which includes KRS 281.685(1) and (2), "shall be fined not less than fifteen dollars nor more than two hundred dollars, or imprisoned for not more than thirty days or both."

(The foregoing doctrine is set forth at length.) *See also* 9 Am. Jur., Carriers, section 286, pages 607-608, and in 13 C. J. S., Carriers, section 27, pages 61-62.

In Burlington Transp. Co. v. Hathaway (Iowa, 1943), 12 N. W. 2d 167, a suit was brought by certain common carriers as plaintiffs against the teamsters, chauffeurs, warehousemen and helpers union and its business agents as defendants to enjoin the latter from requiring employees of the union to refuse to handle the goods of John Blaul's Sons Company, a wholesale grocery company in Burlington, Iowa, which the union was attempting to organize. A picket line had been thrown around the grocery company and the employees of the union refused to transport freight for the grocery company. The Iowa statute as to non-discrimination by carriers is similar to Kentucky's. The substance of the court's decision is as follows:

> "When the plaintiffs obtained their permits to operate as common carriers, they undertook the duty to transport the freight which the public tendered to them for transportation. The failure to carry out this duty to transport would not be excused by showing that its employees refused to obey the employers' order. See Chicago B. & Q. R. Co. v. Burlington, C. R. & N. Ry. Co., et al., C. C., 34 F. 481, and Consolidated Freight Lines, Inc., et al. v. Department of Public Service, et al., 200 Wash. 659, 94 P. 2d 484, 485. In the last cited case a strike of laundry workers at the Davenport Hotel in Spokane resulted in a picket line around that hotel. Certain common carrier truck lines, who had been serving the hotel in the capacity

of picking up freight or baggage and delivering it anywhere in the State of Washington or in the channels of interstate commerce, refused to send their trucks through the picket line at the hotel because the local manager of the teamsters' union threatened to call a strike of the carriers' drivers if they were permitted to go through the picket line. The hotel filed a complaint with the Department of Public Service against the carriers for the cancellation of their permits as common carriers. This resulted in an order suspending temporarily the permits under which the carriers operated. Upon appeal the action of the Commission was affirmed, the Supreme Court of Washington stating: 'The question then arises whether the appellants were excused by reason of the law. They being common carriers, it was their duty, under the facts and circumstances of this case, to send their trucks through the picket line. 13 C. J. S., Carriers, p. 407, sec. 202; Moore on Carriers, 2d Ed., Vol. 1, p. 124; Chicago, B. & Q. R. Co. v. Burlington, C. R. & N. Ry. Co., C. C., 34 F. 481; Burgess Bros. Co. v. Stewart, 112 Misc. 347, 184 N. Y. S. 199.'

• • • • • • • •

"From the above it is clear that if the plaintiffs were to do that which the union sought to compel them to do, namely, not handle the Blaul merchandise, they would be doing an act prohibited by the common law and the statutory law of this state and an act that could subject them to criminal prosecution.

• • • • • • • •

"There was no labor dispute between plaintiffs and their employees or between plaintiffs and the defendant union. The union cannot concertedly exert, in aid of their labor dispute with Blaul, any economic pressure to compel these plaintiffs to do that which the law and public policy forbid. The injunction was rightly issued."

These cases support the rule laid down in the Hathaway case: Pacific Gamble Robinson Co. v. Minneapolis & St. Louis R. Co., (D. C. Minn., 1952) 105 F. Supp. 794; Northwestern Pacific R. Co. v. Lumber & Sawmill Work-

ers Union, etc., (Cal., 1948) 189 Pac. 2d 277; Turner v. Zanes, (Tex., 1947) 206 S. W. 2d 144.

Counsel for Local 89 admit that the Hathaway case correctly sets forth the law on the issue raised by the appeal as of the date it was decided, namely, in 1943, but they insist that the Labor-Management Relations Act of 1947, commonly called the Taft-Hartley Act, 61 Stat. 136 (1947), 29 U. S. C. A., Sec. 151 et seq. (Supp., 1952), makes the question under discussion one exclusively controlled by **(the above)** *this* enactment. To fortify this position, reliance is had upon this part of 29 U. S. C. A., Sec. 158, also known as 8 (b) (4) (D), *of the Act,* which is as follows: "• • • provided, that nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer) if the employees of such employer are engaged in a strike ratified or approved by representative of such employee **(s)** whom such employer is required to recognize under this sub-chapter."

(We do not agree with this line of reasoning. Section 8 (b) (4) (A), (B), (C) and (D) of the Labor-Management Relations Act of 1947 was clearly intended to outlaw only a secondary boycott, and such is not involved in the issue under consideration. See Picketing-Free Speech, Tanenhaus, Cornell Law Quarterly, Fall, 1952, Vol. 38, No. 1, pages 1 to 50; and see also the statement of Senator Taft in 93 Cong. Rec., page 4198. Nor does the above quoted provision purport to make lawful any act which aside from the statute in question is unlawful. The appeal (here) involves the refusal of employees of *common or contract* carriers who *are not on strike but who* happen to belong to Local 89, the bargaining representative of Suppliers' employees, to transport the merchandise of American through the picket line at 17th and Broadway Streets, and this disobedience is not complained of as an unfair labor practice but as a violation of the common law, *the statutory law and the Constitution of Kentucky.* **(the constitutional law and the statutory law of Kentucky.)** (More

than that), *Aside from this, as we have shown,* the illegal conduct of the employees could subject them to criminal prosecution. *We find nothing in the provisions of the above Act or in the decisions of the Supreme Court of the United States construing it that makes such conduct legal when from time immemorial the several states have branded it as illegal. Furthermore, the Supreme Court has taken the position that federal jurisdiction cannot be invoked to protect a course of action, such as that in this case, that would be in conflict with the declared public policy of a state. See Local Union No. 10 v. Graham, 344 U. S. 811, and the cases cited therein.* It follows that the portion of the injunction requiring performance of the duty to carry American's goods in no way impairs the right to strike, the right to picket or any other right guaranteed by the federal law or the Constitution of the United States *but that the order does, on the contrary, enforce obedience to the law and Constitution of the Commonwealth and, as a consequence, it was proper.*

Finally, the employees of the carriers rely upon a provision of the agreement between themselves and their employers covering the period from February 1, 1952, to January 31, 1955, to the effect that it shall not be a violation of their contract or a cause for discharge to refuse to go through the picket line of a union or to refuse to handle unfair goods. They insist that this stipulation excuses them from serving American. The legal duty of a common carrier to handle the merchandise of a shipper without discrimination existed long before the contract came into being, and, by like token, employees of *such* **(common)** carriers, as long as they voluntarily remain in the hire of their employer, do not have the lawful right to withhold their services from a particular customer who deals with their employer. *Here* **(Where)** the common carrier and its employees seek by a contractual provision to avoid the responsibility imposed by *a* statute, *which implements a constitutional provision, and we hold that* such a contractual stipulation is void. **(Such is the case here.)**

The question of whether a contempt has been committed is left for the Chancellor's determination. Our reason for this ruling is that the contempt, if any, is continuous in its nature and it should not be handled piecemeal. Besides, the Chancellor is on the ground, is familiar with the background of this suit and is in a better position to hear the evidence; therefore, this phase of the case can be more expeditiously handled for all concerned in the lower court.

It appears to us that an emergency exists in this case and a mandate shall issue forthwith without prejudice to the right to file a petition for a rehearing.

The judgment is affirmed on the appeal and on the cross-appeal.

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STATUTES CITED.

Interstate Commerce Act § 9, 24 Stat. 382, 49 U. S. C. § 9.

"§ *9. Remedies of persons damaged; election; witnesses.* Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

Interstate Commerce Act, Part II; Motor Carriers § 204(1), 49 Stat. 546, 564; 52 Stat. 1237, 49 U. S. C. A. § 304(1), 322(b).

"§ *304. Powers and duties of commission—(a) Powers and duties generally.*

"It shall be the duty of the Commission—

"(1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"*Jurisdiction of district courts to restrain violations and enforce orders.*

"§ 322(b). If any motor carrier or broker operates in violation of any provision of this chapter (except as to the reasonableness of rates, fares, or charges and the discriminatory character thereof), or any rule, regulation, requirement, or order thereunder, or of any term or condition of any certificate or permit, the Commission or its duly authorized agent may apply to the district court of the United States for any district where such motor carrier or broker operates, for the enforcement of such provision of this chapter, or of such rule, regulation, requirement, order, term, or condition; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such carrier or broker, his or its officers, agents, employees, and representatives from further violation of such provision of this chapter or of such rule, regulation, requirement, order, term, or condition and enjoining upon it or them obedience thereto."

Norris LaGuardia Act, §4(a), 47 Stat. 70, 29 U. S. C. § 104(a).

"§ *104. Enumeration of specific acts not subject to restraining orders or injunctions.*

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any

labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

* * * * * * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 186

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. L., ET AL., PETITIONERS

v.

THE AMERICAN TOBACCO COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE[1]

OPINIONS BELOW

The opinions of the Circuit Court for Jefferson County, Kentucky, are unreported (R. 22–35). The opinion of the Court of Appeals of Kentucky, as originally handed down June 2, 1953 (R. 70–

[1] This *amicus curiae* brief is filed in response to this Court's invitation to the Solicitor General to file a brief setting forth the views of the National Labor Relations Board (R. 104–105).

78), is reported at 258 S. W. 2d 903; and as modified on rehearing on February 5, 1954 (R. 95–103), is reported at 264 S. W. 2d 250. These opinions have not yet been officially reported.

JURISDICTION

The judgment of the Court of Appeals of Kentucky was entered on June 2, 1953 (R. 70), and a petition for rehearing (R. 79–94) was denied on February 5, 1954 (R. 95). On April 23, 1954, the time for filing a petition for a writ of certiorari was extended by order of Mr. Justice Reed (R. 104) to and including July 3, 1954. The petition for certiorari was filed July 2, 1954, and was granted on October 14, 1954 (R. 104–105). The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3).

QUESTION PRESENTED

The Board's interest in this case is limited to a single question, namely, whether the National Labor Relations Act precludes a state court, in a labor dispute subject to the Act, from requiring drivers employed by common and contract motor carriers to cross a strike-picket line established by their union at the premises of the carriers' customer, where the collective agreements between the carriers and the union permit the drivers to respect such picket lines.

STATUTES AND STATE CONSTITUTION INVOLVED

The pertinent provisions of Sections 2, 7, 8 and 10 of the National Labor Relations Act, 49 Stat. 449, as amended by the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C. 141, *et seq.*, are set forth in the Appendix, *infra*, pp. 32–36. Other relevant statutory and state constitutional provisions are: Section 216 (d) of the Motor Carrier Act, 1935 (Interstate Commerce Act, Part II), 49 Stat. 543, 558, as amended, 54 Stat. 924, 49 U. S. C. 316 (d); Section 196 of the Constitution of Kentucky; and Kentucky Revised Statutes, Sections 281.600, 281.610, 281.685, and 281.990. These are set forth in the Appendix, *infra*, pp. 36–40.

STATEMENT

Respondent, The American Tobacco Company, began this suit in a Kentucky state court to enjoin petitioner Union, Local 89 of the International Brotherhood of Teamsters, and its members from conducting picketing at respondent's premises. The trial court entered a permanent injunction which had the effect of requiring members of petitioner Union to cross the picket line at respondent's premises (R. 35–37). The Kentucky Court of Appeals affirmed (R. 95–103). Both Kentucky courts rejected petitioners' contention that the National Labor Relations Act precluded state courts from granting this injunc-

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tion. The pertinent facts may be summarized as follows:

Respondent is engaged in the manufacture and sale of cigarettes and other tobacco, and the Board has consistently exercised jurisdiction over its interstate operations.[2] It has a cigarette factory in Louisville, Kentucky, adjacent to which is a "stemmery" belonging to and operated by a wholly owned subsidiary, American Suppliers, Inc. The latter processes raw tobacco, which is then transported by conveyor belt to respondent's factory for manufacture into cigarettes. Although respondent and American Suppliers are separate corporations, their ownership and operations are so closely related that the courts below held they should be considered as one employer (R. 2, 3, 13, 41, 97–99).[3]

About March 30, 1953, petitioner Union, the certified bargaining representative of certain of American Suppliers' employees, called them out on an economic strike. A picket line was thereupon established around both the stemmery and respondent's cigarette factory (R. 96).

Among the members of this Union are employees of various motor vehicle, common and contract carriers, who transport products to and from

[2] See 2 N. L. R. B. 198; 59 N. L. R. B. 928; 108 N. L. R. B. No. 167 (June 3, 1954).

[3] See also, *American Tobacco, Inc. and American Suppliers, Inc.*, 62 N. L. R. B. 1239, 1242; *Irwin-Lyons Lumber Co.*, 87 N. L. R. B. 54, 56.

the premises of respondent, its subsidiary, and other customers (R. 99). The carriers identified in the record were all engaged in interstate commerce and were thus subject both to the Board's jurisdiction [4] and to the Motor Carrier provisions of the Interstate Commerce Act, 49 Stat. 543, as amended, 54 Stat. 924, 49 U. S. C. 301, *et seq.* The collective bargaining agreement between the Union and these carriers contained a clause permitting the union

[4] The record discloses the names of twelve carriers as involved in this proceeding: Bowling Green Express (R. 11–12), Huber and Huber Express Co. (R. 20), Middlewest Freightways, Inc. (R. 37–38), Commercial Motor (R. 46), Federal Express (R. 53), Silver Fleet (R. 56), Ziffrin Truck Lines (R. 56), C & D Truck Line (R. 58), Husman & Roper (R. 63), Johnson Freight Lines (R. 63), Crutcher Bros. Drayage Company (R. 56), and Clements Truck Line (R. 56). We are advised by the Interstate Commerce Commission that companies bearing those names (in the case of the last two, substantially similar names) engage in interstate operations under certificates of public convenience from the Commission. Unpublished reports for the year ended 1953 in the Commission's files indicate that eleven of these companies are Class I common carriers, each with annual revenue from interstate and intrastate operations in excess of $200,000 per annum, and one, the Crutcher Bros. Co., is a Class II common carrier with annual revenue of over $100,000. Hence, all of these carriers are engaged in commerce within the meaning of the National Labor Relations Act and come within the recently enunciated jurisdictional standards laid down by the Board. *Edelen Transfer Co.*, 110 N. L. R. B. No. 230, 35 L. R. R. M. 1275; *Albert Evans, Trustee of Local No. 391, and Thurston Motor Lines, Inc.*, 110 N. L. R. B. No. 122, 35 L. R. R. M. 1112; *International Brotherhood of Teamsters and McAllister Transfer, Inc.*, 110 N. L. R. B. No. 224, 35 L. R. R. M. 1281 (December 17, 1954).

members to refuse to cross picket lines established at the premises of customers of the carriers.[5]

On April 4, 1953, respondent brought suit in the Circuit Court for Jefferson County, Kentucky, to enjoin the picketing at its premises, on the ground, among others, that it threatened to stop pick-ups by employees of the carriers (R. 1–8). It was alleged, *inter alia,* that such cessation of service would be violative of Section 281.685 of the Kentucky Revised Statutes, which prohibits a common or contract carrier from subjecting "any person to any unreasonable discrimination." (R. 5; App. *infra,* p. 39.) On April 23, 1953, the trial court, accepting this contention and rejecting the Union's contention that the National Labor Relations Act had superseded Kentucky law in this dispute, entered a permanent injunction (R. 35–37).[6] This decree, although permitting picket-

[5] In relevant part, this clause provides (R. 21): "It shall not be considered a violation of this Agreement for employees covered hereunder to refuse to cross a picket line of a Union or refuse to handle unfair goods. The term unfair goods * * * includes * * * any goods or equipment transported, interchanged, handled, or used by any carrier, whether party to this Agreement or not, at whose terminal or terminals or places of business, there is a controversy between such carrier or its employees on the one hand and a labor union on the other hand; * * *"

[6] Earlier, on April 6, 1953, the trial court had issued a temporary restraining order (R. 8–11) which, *inter alia,* enjoined the Union and its members "from refusing or inducing, encouraging, coercing or otherwise causing or arranging with, the employees of other employers, particularly common carriers, or with such employers, to refuse to accept,

ing in limited numbers to continue, on the ground that primary and not secondary picketing was involved, has the effect of requiring members of petitioner Union employed by the common or contract carriers to cross the picket line at respondent's premises.[7]

The Union took an appeal from this provision of the injunction and respondent cross-appealed from the holding that the picketing was primary. The Court of Appeals of Kentucky rejected both contentions and affirmed (R. 95–103).[8] On the cross-appeal, the court found that, in view of the very close relations between respondent and its subsidiary, American Suppliers, the

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handle, transport, and deliver in accordance with their legal and contract obligations, property shipped by or to plaintiff."

Certain union members who continued to respect the picket line after entry of this order were found guilty of contempt (R. 22, 31–33).

[7] Thus, the injunction (R. 36–37) enjoins the Union and its members: "from causing, aiding or abetting any common carrier or contract carrier unreasonably to discriminate against plaintiff by refusing, while remaining an employee thereof, or inducing, encouraging, coercing, or otherwise causing or arranging with common or contract carriers or any persons connected therewith to refuse to accept, handle, transport and deliver, in accordance with their legal contract obligations, property shipped by or to other customers of such contract or common carriers."

[8] On June 2, 1953, the Kentucky Court of Appeals affirmed (R. 70), handing down an initial opinion (R. 70–78). On petition for rehearing (R. 79–94), the original judgment of affirmance was adhered to, but the opinion was modified in certain respects (R. 95–103). References are to the modified opinion which was handed down February 5, 1954, and which superseded the initial opinion.

picketing at the former's premises did not amount to a secondary boycott (R. 95–99). However, it then went on to uphold the injunction on the theory that a refusal of employees of a common or contract carrier to go through a picket line is incompatible with the common law and statutory duty imposed on such carriers to serve all members of the public without unreasonable discrimination (R. 99–103). The court rejected the contention that the National Labor Relations Act protected such refusal in this case and superseded the state law, stating (R. 102):

> * * * this disobedience is not complained of as an unfair labor practice but as a violation of the common law, the statutory law, and the Constitution of Kentucky. Aside from this, as we have shown, the illegal conduct of the employees could subject them to criminal prosecution. We find nothing in the provisions of the above Act or in the decisions of the Supreme Court of the United States construing it that makes such conduct legal when from time immemorial the several states have branded it as illegal. * * * It follows that the portion of the injunction requiring performance of the duty to carry American's goods in no way impairs the right to strike, the right to picket or any other right guaranteed by the federal law or the Constitution of the United States but that the order does, on the contrary, enforce obedience to the

law and Constitution of the Commonwealth and, as a consequence, it was proper.

Finally, respecting the contention that the agreement between the Union and the carriers sanctioned the refusal to cross the picket line, the court concluded that this provision was contrary to the responsibility imposed by Kentucky law on the carriers, and was thus void (R. 102–103).

SUMMARY OF ARGUMENT

A. From the earliest days of the Wagner Act it has been settled that the rights and remedies of the National Labor Relations Act are applicable to motor carriers, common and otherwise, whose operations affect commerce, no less than to other enterprises meeting the Act's jurisdictional requirements. An important segment of the rights and remedies under the Act is concerned with the class of activity involved in the instant case, *i. e.,* sympathetic participation by employees in disputes involving an employer other than their own. The Act comprehensively regulates this activity, affirmatively protecting it in Section 7 under certain circumstances; permitting the employer and the bargaining representatives to contract with respect thereto; and prohibiting it when it assumes the proportions defined in Section 8 (b) (4) (A). Moreover, with respect to the conduct prohibited, the Act, in Section 10 (l), not only provides for the usual Board remedial order, but also permits the Board, pending final decision,

to secure an injunction against the activity in an appropriate federal district court.

The injunction issued by the state court against petitioner and its members, which in effect requires the employees of motor carriers subject to the Act to cross a lawful strike-picket line established by their own union at the premises of the carriers' customers, not only touches a subject which the Act regulates in a comprehensive manner, but directly conflicts with rights and remedies provided by the Act. This picket line was established by the duly authorized bargaining representative of respondent's employees, and the Union invited action, by its own members who were employees of the motor carrier,[5] at respondent's premises, the situs of the primary dispute. The refusal of the carriers' employees to cross the line was in obedience to action by their own union, and far from constituting defiance of their employers' instructions, such refusal was specifically sanctioned by the collective bargaining contract between the carriers and the union (R. 21). In this situation, the sympathetic action which the union sought to have the motor carrier employees engage in falls within the protection of Section 7 of the Act. See *National Labor Relations Board* v. *Rockaway News Supply Co., Inc.*, 345 U. S. 71, 80: "[The Act] clearly enables contracting parties to embody in their contract a provision against requiring an employee to cross a picket line if they so agree."

In any event, Congress' comprehensive and careful handling of the type of activity regulated by the state court, especially in respect to utilizing injunctive remedies, indicates that the particular conduct herein is at least in the "area of labor combat" (*Garner* v. *Teamsters Union,* 346 U. S. 485, 500) covered by the Act. Under either hypothesis, the instant injunction would appear to be barred by this Court's prior decisions that the "states may not regulate in respect to rights guaranteed by Congress in § 7," nor invade a field which the Act has "occupied." *Bus Employees* v. *Wisconsin Board,* 340 U. S. 383, 390–391, n. 12.

B. The decision of this Court in the *Bus Employees* case, *supra,* likewise indicates that there is no basis for qualifying the effect of the Act on this dispute because Kentucky law has imposed on motor carriers, by reason of their public calling, a duty to serve without discrimination. In that case, the validity of Wisconsin legislation, depriving employees of certain public utilities and common carriers subject to the Act of the right to strike, was in issue. Its proponents argued that, in the light of the historic amenability of public callings to state control and the severe repercussions on a community of stoppages in such enterprises, it could not be assumed that Congress had intended by the Act to remove those businesses from the orbit of state regulation. This Court, however, rejected the contention, *inter*

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alia, because the whole history of the Act and its administration demonstrate that Congress intended to draw no distinction between businesses with a public calling and other enterprises. These same considerations are dispositive of the similar contention here.

Moreover, the foregoing analysis does not give rise to a conflict with or impair the policies of the other federal legislation in this field, the Motor Carrier Act. Although that statute requires that a common carrier by motor vehicle must furnish service without "unjust discrimination or any undue or unreasonable prejudice or disadvantage," 49 U. S. C. 316 (d), the Interstate Commerce Commission has held that this does not obligate a carrier to cross a picket line like that here, occasioned by a strike of the shipper's own employees. See *Montgomery Ward & Co., Inc.* v. *Consolidated Freightways, Inc.*, 42 M. C. C. 225.

ARGUMENT

THE NATIONAL LABOR RELATIONS ACT PRECLUDED THE STATE COURT FROM ORDERING THE CARRIER EMPLOYEES TO CROSS THE PICKET LINE AT RESPONDENT'S PREMISES

A. THE LABOR ACTIVITY REGULATED BY THE STATE COURT IS WITHIN THE FIELD COVERED BY THE ACT

The first case decided by the Board under the Wagner Act, *Pennsylvania Greyhound Lines, Inc.*, 1 N. L. R. B. 1, held that the rights and remedies of the Act were available to the employees of

common carrier motor vehicles no less than to other employees in industries affecting commerce. In arriving at this conclusion, the Board noted, 1 N. L. R. B. at 42, that the Motor Carrier Act of 1935, "unlike the parallel legislation in the railway field," contained "no provisions for collective bargaining and employee freedom of organization" and that this "omission was succinctly explained * * * by Senator Wheeler * * * on the ground that the Wagner Act then before Congress would cover the field of motor transportation and that therefore such provisions need not be incorporated in the Motor Carrier Act (Cong. Record, 74th Congress, 1st Sess., Vol 79, p. [5660])." Accordingly, the Board in that case went on to adjudicate the merits, finding that the carrier had violated the Act by interfering with, restraining and coercing its employees in the exercise of rights guaranteed by Section 7. The Board's remedial order was subsequently sustained by this Court, *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261.[9] Thereafter, the Wagner Act was applied in numerous cases involving all types of motor carriers whose operations affected commerce.[10]

[9] Also, e. g., *Washington, Virginia & Maryland Coach Co.* v. *National Labor Relations Board*, 301 U. S. 142; *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272.

[10] *National Labor Relations Board* v. *Dixie Motor Coach Corp.*, 128 F. 2d 201 (C. A. 5), enforcing as modified 25

In amending the National Labor Relations Act, Congress made no changes which would have removed the labor-management relations of the motor transport industry from its ambit. Indeed, the legislative history indicates that, in formulating the restrictions on union activity added by Section 8 (b) of the amended Act (discussed *infra* pp. 20–21), Congress had before it the problems of that industry, including the problem here of the carrier's inability to serve customers whose premises were being picketed.[11] Accordingly, the rights and remedies of the amended Act have likewise been held applicable and applied to both

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N. L. R. B. 869; *National Labor Relations Board* v. *Baltimore Transit Co.*, 140 F. 2d 51 (C. A. 4), enforcing as modified 47 N. L. R. B. 109, certiorari denied, 321 U. S. 795; *Great Southern Trucking* v. *National Labor Relations Board*, 127 F. 2d 180 (C. A. 4), enforcing 34 N. L. R. B. 1068, certiorari denied, 317 U. S. 652; *National Labor Relations Board* v. *East Texas Motor Freight Lines*, 140 F. 2d 404 (C. A. 5), enforcing 47 N. L. R. B. 1023; *Oklahoma Transportation Co.* v. *National Labor Relations Board*, 136 F. 2d 42 (C. A. 5), enforcing as modified 46 N. L. R. B. 1214; *National Labor Relations Board* v. *Capitol Greyhound Lines*, 140 F. 2d 754 (C. A. 6), enforcing 49 N. L. R. B. 156, certiorari denied, 322 U. S. 763; *National Labor Relations Board* v. *Brashear Freight Lines*, 119 F. 2d 379 (C. A. 8), enforcing as modified 13 N. L. R. B. 191.

[11] See Hearings before the Senate Committee on Labor and Public Welfare on S. 55 and S. J. Res. 22, 80th Cong., 1st Sess., pp. 381, 386–387; Hearings before the House Committee on Education and Labor on H. R. 8, *et al.*, 80th Cong. 1st Sess., p. 576 ff.

common and other kinds of motor carriers whose operations affect commerce.[12]

An important segment of the rights and remedies under the Act of motor carrier employees and employers, as for those of other enterprises, is concerned with the type of activity involved in the instant case, *i. e.,* sympathetic participation by employees in disputes involving an employer other than their own. The Act comprehensively regulates this activity, affirmatively protecting it under certain circumstances; permitting the employer and the bargaining representative to contract with respect thereto; and prohibiting it when it assumes the proportions defined in Section 8 (b) (4) (A). Moreover, with respect to the conduct prohibited, the Act not only provides for the usual Board remedial order, but also, by section 10 (l) permits the Board, pending final decision, to secure an injunction against the activity in the appropriate federal district court.

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[12] E. g., *National Labor Relations Board* v. *Braswell Motor Freight Lines*, 209 F. 2d 622 (C. A. 5), enforcing as modified 101 N. L. R. B. 1151; *National Labor Relations Board* v. *Dean, J. L., d/b/a D & D Transportation Co.*, 212 F. 2d 207 (C. A. 5), enforcing N. L. R. B. 920; *National Labor Relations Board* v. *Red Arrow Freight Lines, Inc.*, 180 F. 2d 585 (C. A. 5), enforcing 77 N. L. R. B. 859, certiorari denied, 340 U. S. 823; *Amalgamated Association, etc.* v. *Dixie Motor Coach Corp.*, 170 F. 2d 902 (C. A. 8), reversing 74 F. Supp. 952; *National Labor Relations Board* v. *Houston and North Texas Motor Freight Lines*, 193 F. 2d 394 (C. A. 5), enforcing as modified 88 N. L. R. B. 1462.

Thus, Section 7 of the Act, *inter alia,* guarantees to employees, including those of motor carriers, the right to "assist labor organizations * * * and to engage in other concerted activities for the purpose of * * * mutual aid or protection." For reasons detailed in the brief previously filed by the Government in the *Rockaway News* case,[13] to pp. 17–66 of which the Court is respectfully referred, this guarantee, read in the light of Congress' objective of comprehending the conventional tactics of organized labor and of the breadth of Sections 2 (3) and 2 (9),[14] confers upon employees, not involved in any labor dispute with their own employer, the right to assist and make common cause with a union striking another employer, by refusing to cross its picket line established at the latter employer's premises.

Where, as here, an employee refuses in the course of his employment to cross a picket line

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[13] *National Labor Relations Board* v. *Rockaway News Supply Co., Inc.*, No. 318, October Term, 1952. In deciding this case, 345 U. S. 71, the majority of the Court found it unnecessary to reach this question, for it viewed the refusal to cross the picket line there as a breach of the "no-strike" clause in the collective bargaining contract between the employee's union and his employer.

[14] Section 2 (3) provides that the term "employee" shall not "be limited to the employees of a particular employer," and "shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute." Section 2 (9) defines "labor dispute" so that it is not dependent on "whether the disputants stand in the proximate relation of employer and employee."

at the plant of another employer who is involved in a labor dispute, the employee thereby "assists" the labor organization in its dispute with that employer. Manifestly, too, when the pickets invite employees of other employers to refrain from crossing the picket line and make common cause with them by withholding their services from the picketed employer and these employees in turn respond to that invitation, they are acting in concert with the pickets and the employees they represent for "the purpose of mutual aid or protection." "The reluctance of workers to cross a picket line is notorious. To them the presence of the line implies a promise that if they respond by refusing to cross it, the workers making the appeal will in turn cooperate if need arises. The converse, likewise, is implicit. 'Respect our picket line and we will respect yours.'" *Printing Specialties Union* v. *Le Baron*, 171 F. 2d 331, 334 (C. A. 9), petition for certiorari dismissed, 336 U. S. 949. In short, an employee who refuses to cross such a picket line is, in the words of Section 7, exercising "the right to * * * assist labor organizations * * * and to engage in other concerted activities for the purpose of * * * mutual aid or protection."[15] This conclusion is con-

[15] Cf. this Court's holding in *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U. S. 665, that the Act permits a labor organization to picket an employer with whom it is engaged in a labor dispute so as "to influence * * * employees of a customer * * * not to cross the picket line," this being no more than is "traditional and per-

firmed by the proviso at the end of Section 8 (b) (4), which declares that:

> nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act.

At the same time as it confers a right to respect a picket line, the Act contemplates that such right may be qualified in particular situations. Under the Act, this right, like "so many others," is "not unlimited in the sense that [it] can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee." *Republic Aviation Corporation* v. *National Labor Relations Board,* 324 U. S. 793, 798. Hence, in recognition of the employer's competing interest in maintaining his operations, the Board has concluded that he may, without abridging rights protected by Section 7, require that the employee cross the picket line and, should the latter persist in declining to do so, then replace him with another employee.[16] Also, as the

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missible in a primary strike." *National Labor Relations Board* v. *Denver Building and Construction Trades Council,* 341 U. S. 675, 687.

[16] Under the earlier decisions of the Board, an employer could not qualify for this immunity if he discharged the

Board has added, the protection, which Section 7 accords to the right to observe a picket line, is given only when the picketing is not in itself unlawful.[17] Moreover, as this Court held in the *Rockaway News* case, 345 U. S. 71, the employee's bargaining representative may, in the collective agreement with the employer, entirely waive the right not to cross a picket line, or the parties may properly go to the other extreme where the employer consents in advance to unlimited exercise of the right. Thus, referring to the proviso to Section 8 (b) (4), quoted *supra*, p. 18, the Court stated, 345 U. S. at 80: "This clearly enables contracting parties to embody in their contract a provision against requiring an employee to cross

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employee outright, but would first have to order him to assume the status of a full striker and, while in that status, find a replacement for him. See *Rockaway News Supply*, 95 N. L. R. B. 336, 337; *Cyril de Cordova*, 91 N. L. R. B. 1121, 1137-1138. This Court, when the *Rockaway News* case came before it, observed that the "distinction between discharge and replacement in this context seems to us as unrealistic * * * It is not based on any difference in effect upon the employee," 345 U. S. at 75. Accordingly, in *Robert H. Snow d/b/a Auto Parts Co.*, 107 N. L. R. B. No. 78, 33 L. R. R. M. 1114 (November 30, 1953), the Board sanctioned the outright discharge of an employee for disobeying the employer's order to cross a picket line, where there was "no evidence of anti-union bias," and it appeared, from the fact "that he hired a replacement who was willing to make the necessary deliveries without reservation," that the employer "acted only to preserve the efficient operation of his business" (n. 2).

[17] See *Pacific Telephone and Telegraph Company*, 107 N. L. R. B. No. 301, 33 L. R. R. M. 1433 (March 12, 1954).

a picket line if they so agree. And nothing in the Act prevents their agreeing upon contrary provisions if they consider them appropriate to the particular kind of business involved."

On the other hand, though the Act thus leaves room for the sympathetic participation of employees in disputes going on at another employer's premises, Section 8 (b) (4) (A) proscribes enlisting the aid of such employees by means of a secondary boycott designed to force neutral employers to cease doing business with the employer involved in the primary dispute.[18] Thus, for example, while the Act may permit the employees of a motor carrier to be induced by a picket line at a customer's premises not to serve him,[19] it proscribes inducing these employees to discontinue servicing that customer at their own employer's premises or elsewhere in the course of their employment.[20] Here too, however, the Act appears

[18] See *National Labor Relations Board* v. *Denver Building and Construction Trades Council*, 341 U. S. 675, 686–687.

[19] See *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U. S. 665; *Newspaper and Mail Deliverers' Union*, 90 N. L. R. B. 2135.

[20] *International Brotherhood of Teamsters, etc. and Roy Stone Transfer Company*, 100 N. L. R. B. 856; *International Brotherhood of Teamsters, etc. and Irvin J. Cooper*, 101 N. L. R. B. 1284; *International Brotherhood of Teamsters, etc. and Osceola Foods, Inc.*, 107 N. L. R. B. No. 63, 33 L. R. R. M. 1098; *International Brotherhood of Teamsters, etc. and Jay K. Independent Lumber Corp.*, 108 N. L. R. B. 189, 34 L. R. R. M 1195.

The inducement proscribed by Section 8 (b) (4) (A) is inducement of employees only, and it is not illegal under the legislative scheme for a labor organization to induce an

to allow for the operation of contractual arrangements between the parties. See *Rabouin d/b/a Conway's Express*, 87 N. L. R. B. 972, 981–982, enforced, 195 F. 2d 906, 912 (C. A. 2). Cf. *International Brotherhood of Teamsters, etc., and McAllister Transfer, Inc.*, 110 N. L. R. B. No. 224, 35 L. R. R. M. 1391 (December 16, 1954).

Viewing the facts of the instant case against this background, we think that the state court has not only laid hold of a subject which the Act regulates in a comprehensive manner, but has reached a result that conflicts with the rights and remedies which it has fashioned.[21] As already shown, *supra*, p. 4, the Board has consistently exercised jurisdiction over respondent, at whose premises the labor dispute and the picketing herein arose. It likewise has jurisdiction over the motor carriers servicing respondent. These carriers are directly engaged in interstate commerce (see n. 4, *supra*, p. 5) and their operations affect commerce within the meaning of the Act. Moreover, the sympathetic action which petitioner Union sought to have the motor carrier employees engage in, far from being interdicted

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employer to stop doing business with another person. *International Brotherhood of Teamsters, etc. and Arkansas Express, Inc.*, 92 N. L. R. B. 255; *Rabouin* v. *National Labor Relations Board*, 195 F. 2d 906, 911 (C. A. 2).

[21] For a general discussion of the problem presented by this case, see Note, *Duty of Common Carrier to Cross Picket Line of Shipper's Employees to Receive Goods for Carriage*, 67 Harv. L. Rev. 317 (1953).

under the Act, is one of the forms of mutual assistance and concerted activity affirmatively protected by Section 7 thereof.[22] Here, the picket line was established by the duly authorized bargaining representative of respondent's employees, and the Union invited action by the motor carrier employees only at respondent's premises, the situs of the primary dispute. Furthermore, unlike the situation in *Rockaway News,* the refusal of the carriers' employees to cross the line at respondent's factory was "in obedience to * * * action by [their] union" (345 U. S. at 75); and, rather than constituting defiance of their employers' instructions, their refusal was specifically sanctioned by the contract between the carriers and the Union (*id.,* at 80).[23]

In sum, in the situation here, Congress has concluded that a balance between the interests of employers, employees and the public is best achieved by leaving the carrier employees free

[22] The Court of Appeals of Kentucky apparently overlooked this Section in its conclusion that the Act did not have any application to the instant case. For its opinion indicates that it reached this conclusion solely on the ground that the Union's action "is not complained of as an unfair labor practice" (R. 102).

[23] Respondent's suggestion (Response to Petition For Writ of Certiorari, 4–5, 16) that the Union and the motor carrier employers did not wholeheartedly back the employees' refusal to cross the picket line does not establish the contrary. The incidents referred to by respondent relate only to the period after the injunction had issued and to the efforts of the Union and the motor carrier to insure compliance therewith (R. 31–33, 42–49, 51–54, 57–63, 64–68).

to honor the picket line at respondent's premises, a result which would also be consistent with the contractual arrangement between the carriers and the Union. The state court, on the other hand, has obliterated this freedom and rejected the arrangement of the parties, thereby according a greater protection to the interests of the employer than Congress deemed appropriate in the circumstances presented.

Accordingly, we believe that the instant state court injunction infringes upon a federally protected right. In any event, Congress' comprehensive and careful handling of the type of activity regulated thereby (pp. 15–21, *supra*), especially in respect to utilizing injunctive remedies,[24] indicates that the particular conduct here is at least in the "area of labor combat" (*Garner* v. *Teamsters Union*, 346 U. S. 485, 500) covered by the Act.[25] Under either hypothesis, the in-

[24] See Brief for the National Labor Relations Board in *Weber* v. *Anheuser-Busch, Inc.*, No. 97, this Term, pp. 21–25.

[25] See also, *Auto. Workers* v. *O'Brien*, 339 U. S. 454, 456–457; *Bus Employees* v. *Wisconsin Board*, 340 U. S. 383, 389–390.

Auto. Workers v. *Wisconsin Board*, 336 U. S. 245, is distinguishable for it involved conduct outside of this "area"; the Court viewed the "quickie" strike there as a coercive technique which Congress neither considered nor sought to regulate in the Act, but left entirely "ungoverned." Similarly, the conduct and the remedy involved in *United Construction Workers* v. *Laburnum Corp.*, 347 U. S. 656, was outside the area preempted by the Act; the legislative history in respect to labor violence (unlike that relating to the peaceful activities here) specifically discloses (347 U. S. at

junction would appear to be barred by this Court's prior decisions that the "states may not regulate in respect to rights guaranteed by Congress in § 7," nor invade a field which the Act has "occupied." *Bus Employees* v. *Wisconsin Board*, 340 U. S. 383, 390–391, n. 12.[26] Moreover, as is shown in subpoint B, *infra*, the validity of this conclusion is in no way altered because it results in qualifying the special duty which Kentucky law has imposed on common or contract motor carriers to serve the public without discrimination.[27]

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pp. 668–669) that Congress intended to preserve a concurrent state power in this area, and, since the Act only provides an injunctive remedy against such violence, the Court also concluded that the supplementary remedy of damages provided by Virginia in that case constituted no intrusion upon or interference with the regulatory scheme of the Act.

[26] *Garner* v. *Teamsters Union*, 346 U. S. 485; *Capital Service Inc.* v. *National Labor Relations Board*, 347 U. S. 501; *Automobile Workers* v. *O'Brien*, 339 U. S. 454; *Plankinton Packing Co.* v. *Wisconsin Board*, 338 U. S. 953; *Bethlehem Steel Co.* v. *New York Board*, 330 U. S. 767; *Hill* v. *Florida*, 325 U. S. 538.

Giboney v. *Empire Storage & Ice Co.*, 336 U. S. 490, and *Local Union No. 10* v. *Graham*, 345 U. S. 192, relied on by respondent (Response to Petition for Certiorari, 17–19), are inapposite for they involved local businesses apparently not subject to the Board's jurisdiction, and thus did not present any question as to the superseding effect of the Act.

[27] Preliminarily, it may be noted that the Kentucky law itself specifies that the provisions applied by the state court herein "shall apply to interstate commerce, *except* insofar as such application is in conflict with any provision of the Constitution of the United States or the Acts of Congress." [Emphasis added.] Kentucky Rev. Stats., Sec. 281.610.

B. THE EFFECT OF THE ACT ON THE INSTANT LABOR DISPUTE IS NOT QUALIFIED BY THE SPECIAL STATUS OF MOTOR CARRIERS UNDER KENTUCKY LAW

The basic premise underlying the decision of the Court of Appeals of Kentucky seems to be that, because the duty of common carriers to serve the public without discrimination is so ingrained in the law and was expressly adopted by the state in both its Constitution and statutory law,[28] such duty is necessarily paramount to "the right to strike, the right to picket or any other right guaranteed by the federal law or the Constitution of the United States" (R. 102). A similar contention was rejected by this Court in *Bus Employees* v. *Wisconsin Board,* 340 U. S. 383.

In that case, Wisconsin had enacted legislation which deprived employees of certain public utili-

[28] To the extent that the common law imposes the duty of an "insurer" upon carriers, it appears that only so-called common carriers (*i. e.*, those who hold themselves out to serve the general public), as distinguished from private or contract carriers who agree to serve only those covered by specific contract, are subject thereto. See cases collected in 9 American Jurisprudence, Carriers, §§ 10, 661. Accordingly, in imposing an obligation on both common and contract carriers to serve without discrimination, the Kentucky statute herein (p. 39, *infra*) goes beyond the common law rule, and even the Kentucky Constitution itself which is limited to common carriers (p. 37, *infra*). In this respect, the statute also goes beyond the Motor Carrier Act, whose provision against "unjust discrimination" is made applicable only to common carriers (see pp. 36–37, *infra*).

ties and common carriers [29] subject to the Act of the right to strike, substituting therefor compulsory arbitration. Invoking this legislation, the Wisconsin courts enjoined strikes called by the employees of local transit and gas companies otherwise subject to the Act, denying their claim that the state statute, as applied to them, abridged rights guaranteed by the Act and was thus invalid. The prior decisions of this Court which appeared to support the employees' contention were distinguished principally on the ground that, in the light of "the historic amenability" of public callings to state control and the severe repercussions on a community of stoppages in such enterprises, it could not be assumed that Congress had intended by the Act to remove those businesses "from the orbit of State regulation" (see 340 U. S. at 403–405). But, the majority of this Court expressly repudiated this view, in these words (340 U. S. at 391–393):

> Ever since the question was fully argued and decided in *Consolidated Edison Co.* v. *Labor Board,* 305 U. S. 197 (1938), it has been clear that federal labor legislation, encompassing as it does all industries "affecting commerce," applies to a privately owned public utility * * *. The courts of appeal

[29] The statute applied to a "public utility employer," which was defined as including any employer "engaged in the business of furnishing water, light, * * * public passenger transportation." Wisconsin Stat., 1949, Section 111.51.

> have uniformly held enterprises similar to * * * the Milwaukee gas and transit companies before us in these cases subject to the provisions of the federal labor law. No distinction between public utilities and national manufacturing organizations has been drawn in the administration of the Federal Act, and, when separate treatment for public utilities was urged upon Congress in 1947, the suggested differentiation was expressly rejected. Creation of a special classification for public utilities is for Congress, not for this Court. [Footnotes omitted.]

So here, as already shown, *supra* pp. 12–15, the Act draws no specific distinction between motor carriers (common or otherwise) and other employers; the Board has consistently exercised jurisdiction over such carriers when their operations have affected commerce; and the courts have sustained the exercise of such jurisdiction. Moreover, the legislative history of the amended Act reveals that Congress gave specific consideration to the labor problems of common carriers (see n. 11, *supra*), and, despite such consideration, the amendments enacted furnish no indication that Congress intended the carriers' problems to be treated differently from those of other employers.[30] Accordingly, there is no more basis

[30] Indeed, the proviso to Section 10 (a) empowering the Board, in accord with the prescribed conditions therein, to cede jurisdiction "over any cases in any industry (other than mining, manufacturing, communications, and transportation

for permitting the policy of Kentucky in respect to motor carriers to qualify rights under the Act than there was for sustaining the comparable policies of Wisconsin in the *Bus Employees* case.[31]

except where predominantly local in character)" confirms the conclusion that Congress for purposes of the Act drew no distinction between the transport industry and other industries subject to the Act and continued to include that industry within the ambit of the statute.

Cf. Labor Management Relations Act, 1947, Secs. 206-210, 29 U. S. C. 176-180, permitting the United States to obtain injunctive relief against strikes which imperil the "national health or safety." In enacting this qualification, Congress considered and rejected a broader proposal which would have limited the rights of employees in "*transportation*, public utility or communication services" whenever a labor dispute threatened a cessation or curtailment of "services essential to the public health, safety, or interest." H. R. 3020, 80th Cong., 1st Sess., Secs. 203-206. See *Bus Employees* v. *Wisconsin Board*, 340 U. S. at 392-393, n. 15-16.

[31] It is immaterial that the Wisconsin statute deprived utility employees of the right to strike, whereas, according to respondent's interpretation (Response to Petition for Certiorari, 7-8), the Kentucky injunction here did not preclude the carrier employees from striking but merely from refusing to cross the picket line while in the course of employment. Since, as we have shown, the right to cross a picket line in this case is protected by the Act no less than the right to strike, the "narrower" Kentucky restraint abridges rights under the Act just as much as the "broader" Wisconsin ban. Moreover, the interest of a state in protecting a single shipper against discrimination can be no greater than its interest in protecting the shipping public generally from a total strike; if the latter would not warrant suspension of the Act's reach, the former certainly should not either.

See also, *S. E. Overton Co.* v. *Teamsters,* 115 F. Supp. 764, 771–772 (W. D. Mich.).

It should also be emphasized that the foregoing analysis does not give rise to a conflict with or impairment of the policies of the Motor Carrier Act, the other federal legislation in this field. Cf. *Southern Steamship Co.* v. *National Labor Relations Board,* 316 U. S. 31, 47. As noted at the outset, *supra,* pp. 12–15, that statute contemplates that the labor relations of motor carriers and their employees shall be governed by the National Labor Relations Act. Moreover, although that statute requires common carriers to furnish services without "unjust discrimination or any undue or unreasonable prejudice or disadvantage", 49 U. S. C. 316 (d), the Interstate Commerce Commission has held that this does not obligate a carrier to cross a picket line occasioned, as here, by a strike of the shipper's own employees.[32] Accordingly, just as the require-

[32] See *Montgomery Ward & Co., Inc.* v. *Consolidated Freightways, Inc.,* 42 M. C. C. 225; *Montgomery Ward & Co., Inc.* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.,* 268 I. C. C. 257. But cf. *Montgomery Ward & Co., Inc.* v. *Santa Fe Trail Transportation Co.,* 42 M. C. C. 212.

Notwithstanding the carrier's immunity to an ICC cease and desist order, he may still be liable in damages to the shipper. See *Minneapolis & St. Louis Railway Co.* v. *Pacific Gamble Robinson Co.,* 34 L. R. R. M. 2739 (C. A. 8, August 20, 1954); *Montgomery Ward & Co., Inc.* v. *Terminal Co.,* 32 L. R. R. M. 2386 (D. Ore., June 30, 1953). How-

ment in Section 202 of the Federal Communications Act, 48 Stat. 1064, 1070, 47 U. S. C. 202, that telegraph or radio companies must serve all without "unjust or unreasonable discrimination" did not warrant an abridgment of the Section 7 rights of the employees of those employers in *National Labor Relations Board* v. *Globe Wireless, Ltd.*, 193 F. 2d 748, 750–751 (C. A. 9), so the Motor Carrier Act does not require a curtailment in those rights of the employees of motor carriers.[33]

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ever, in this respect the carrier appears to be in no different position from that of a union who, though found by the Board not to have violated Section 8 (b) (4) (A) of the Labor Relations Act, may still have to pay damages on account of the same conduct, as a result of a suit brought under Section 303 of the Labor Management Relations Act, 61 Stat. 136, 158, 29 U. S. C. 187. See *United Brick & Clay Workers* v. *Deena Artware, Inc.*, 198 F. 2d 637, 642 (C. A. 6), certiorari denied, 344 U. S. 897; *Longshoremen's Union* v. *Juneau Spruce Corp.*, 342 U. S. 237, 243–244.

[33] Cf. the holdings that the Motor Carrier Act does not relax the requirements of the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. 101, *et seq.*, so as to liberalize the issuance of injunctions in the federal courts against motor carrier employees engaging in strike activities. *Lee Way Motor Freight, Inc.* v. *Keystone Freight Lines, Inc.*, 126 F. 2d 931, 934 (C. A. 10), certiorari denied, 317 U. S. 645; *East Texas Motor Freight Lines* v. *International Brotherhood of Teamsters*, 163 F. 2d 10 (C. A. 5); *Southeastern Motor Lines, Inc.* v. *Hoover Truck Co., Inc.*, 34 F. Supp. 390, 392 (M. D. Tenn.). Cf. *Trainmen* v. *Toledo, P. & W. R. Co.*, 321 U. S. 50.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the injunction issued by the Kentucky Court in this case is invalid, and that the judgment below should be reversed.

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FEBRUARY 1955.

APPENDIX

1. The National Labor Relations Act, 49 Stat. 449, as amended by the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C. 141, *et seq.*, in pertinent part, provides:

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concern-

ing the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * *

[61 Stat. 137, 29 U. S. C. 152.]

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

[61 Stat. 140, 29 U. S. C. 157.]

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, trans-

port, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided,* That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if

the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

* * * * *

[61 Stat. 140, 29 U. S. C. 158.]

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

* * * * *

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8 (b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like char-

acter in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: * * * In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8 (b) (4) (D). [61 Stat. 146, 29 U. S. C. 160.]

2. Section 216 (d) of the Motor Carrier Act, 1935 (Interstate Commerce Act, Part II), 49 Stat. 543, 558, as amended, 54 Stat. 924, 49 U. S. C. 316 (d), provides:

Undue preferences or prejudices prohibited

All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust

and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

3. The pertinent provisions of the Constitution and Revised Statutes of Kentucky provide:

CONSTITUTION OF KENTUCKY

Section 196:

Regulation of common carriers; no relief from common law liability. Transportation of freight and passengers by railroad, steamboat or other common carrier, shall be so regulated, by general law, as to prevent unjust discrimination. No common carrier shall be permitted to contract for relief from its common law liability.

Kentucky Revised Statutes:

Section 281.600. *Administrative Functions and Powers of the Department.*

The Department of Motor Transportation shall exercise all administrative func-

tions of the state in relation to motor transportation as defined in this chapter, and shall apply, as far as practicable, the administrative and judicial interpretations of the Federal Motor Carrier Act. It shall have the right to regulate motor carriers as provided in this chapter, and to that end may establish reasonable requirements with respect to continuous and adequate service of transportation, systems of accounts, records and reports, preservation of records and safety of operation and equipment. It may issue subpoenas, subpoenas duces tecum and orders of personal attendance for the attendance of witnesses, any proceeding before it, and permit the [sic] and production of pertinent records, for taking of depositions, all in accord with the Civil Code of Practice, and it shall have the power to make such rules and regulations as it may deem necessary to carry out the provisions of this chapter.

Section 281.610. *Regulation of Interstate Commerce.*

(1) The provisions of this chapter shall apply to interstate commerce, except insofar as such application is in conflict with any provision of the Constitution of the United States or the Acts of Congress.

(2) The commissioner may grant a certificate of convenience and necessity for the transportation of persons or property for compensation in interstate commerce, and may regulate such interstate commerce under the authority of and in accordance with the provisions of any Act of Congress vesting in or delegating to the commissioner such authority as an agency of the United States Government. The commissioner may notify the proper department of the

Federal Government of his assent to the requirements and conditions of such Act of Congress in regard to interstate commerce by motor vehicle.

Section 281.685. *Adherence to Rates, Fares, Charges and Schedules; Discrimination.*

(1) No common carrier shall charge, demand, collect or receive a greater, less or different compensation for the transportation of persons or property or for any service in connection therewith, than the rates, fares and charges specified in its tariffs and classifications filed with the department and in effect at the time; nor shall any common carrier refund or remit any part of the rates, fares or charges so specified, or make or give any unreasonable preference or advantage to any person, or subject any person to any unreasonable discrimination.

(2) No contract carrier shall charge, demand, collect or receive a greater, less or different compensation for the transportation of persons or property or for any service in connection therewith than that contained in the contract required to be filed with the department and in effect at the time; nor shall any contract carrier refund or remit any part of the charges specified in the contract, or make or give any unreasonable preference or advantage to any person, or subject any person to any unreasonable discrimination.

Section 281.990. *Penalties.*

(1) Any person who violates, or causes, aids or abets any violation of, any of the

provisions of this chapter or any order, rule or regulation lawfully issued pursuant to authority granted by this chapter, or who knowingly makes any false or erroneous statement, report or representation to the Department of Motor Transportation with respect to any matter placed under the jurisdiction of the department by this chapter, or who knowingly makes any false entry in the accounts or records required to be kept pursuant to the authority granted by this chapter, or who knowingly fails to keep, or knowingly destroys or mutilates, any such accounts or records, shall be fined not less than fifteen dollars nor more than two hundred dollars, or imprisoned for not more than thirty days, or both. Every device to evade or to prevent the application of any provision of this chapter, or any lawful order, rule or regulation of the department issued pursuant thereto, shall constitute a violation thereof.

U. S. GOVERNMENT PRINTING OFFICE: 1938

APRIL 4, 1955.

Decisions Per Curiam.

No. 186. GENERAL DRIVERS, WAREHOUSEMEN, AND HELPERS, LOCAL UNION No. 89, ET AL. *v.* AMERICAN TOBACCO CO., INC. Certiorari, 348 U. S. 813, to the Court of Appeals of Kentucky. Argued March 31–April 1, 1955. Decided April 4, 1955. *Per Curiam:* The judgment is reversed. *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468; *Bus Employees* v. *Wisconsin Board*, 340 U. S. 383. *Herbert S. Thatcher* and *William S. Tyson* argued the cause for petitioners. *J. Albert Woll, David Previant* and *Ralph H. Logan* were with *Mr. Thatcher* on the brief. By special leave of Court, *Dominick L. Manoli* argued the cause for the National Labor Relations Board, as *amicus curiae*, urging reversal. With him on the brief were *Solicitor General Sobeloff, David P. Findling* and *Norton J. Come*. *Nelson Helm* argued the cause for respondent. With him on the brief was *Francis E. Koch*. Reported below: 264 S. W. 2d 250.